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IN MEDIÆVAL BRITAIN

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TORT, CRIME, AND POLICE

IN MEDIÆVAL BRITAIN

A Review of some Early Law and Custom

BY

J. W. JEUDWINE, LL.B. CAMB.

Of Lincoln's Inn, Barrister-at-Law

Author of "The First Twelve Centuries of British Story," "The Manufacture of Historical Material," and other works

Not unto me the shame
But to the shamefull doer it afford.
Blood is no blemish; for it is no blame
To punish those that do deserve the same.
But they that break bands of civilitie
And wicked customs make, these do defame
Both noble armes and gentle curtesie;
No greater shame to man than inhumanitie.

The Faerie Queene.

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INTRODUCTION

The records now existing of law and custom in the British Islands in mediæval times are very many and very varied. There are great sources of information of all kinds preserved in the Record Office, there are the great series of the Year Books being slowly edited, there are the collections of Ancient Law of Ireland, of England, and of Wales, and the Customs of Normandy and many other French sources of information, and the Icelandic Gragas and Norwegian and Danish Laws.

Unfortunately, the larger part of these authorities are locked up in a form useless for historical study, owing to the want of knowledge of the archaic forms of the different languages in which they have been written. For British history, six ancient languages are necessary: old Norse, Danish, Irish, Welsh, French (various forms), and monastic Latin.

The great Scandinavian collections of law and history are either, like the Gragas and Gulathingslaw, untranslated and inaccessible except in the archaic forms, or they are noted only in such writers as Steenstrup. If, like many of the Sagas, they have been translated and edited by experts, they are either out of

print or remaindered. With rare exceptions, such as the Nials or Laxdæla Sagas, they are not available for students.

All the records in the Celtic tongues of the peoples in these Islands west of the Severn and north of the Trent, even where in spite of poverty they have been edited away from England by real Welsh and Irish archivists, are left to one side untouched and unimproved by the English Parliamentary historian who controls education in this country. Even the miserable grant given for the study of Celtic was withdrawn by the late Government, without protest, for fear it should be used for political purposes. Study in this direction is for the most part at a standstill.

The various French dialects have fared a little better. They have been edited by French historical critics, men of well-balanced judgment and moderate language. But these valuable sources of history have been but little used by our historians, as coming from the despised Latin races.

The Year Books of which I treated in my *Manufacture of Historical Material* stand by themselves. Of this class of our authorities Professor Skeat says: "I know of nothing more disgraceful to such a land as England, the lawyers of which have made more or less use of Anglo-French for some eight hundred years, than the fact that no one has taken in hand to make a reasonably useful dictionary or even a vocabulary of this highly important language."

A few of the Year Books have been prepared for use, but the greater part are still only accessible in sixteenth-century black-letter printer's adventures of Tottyl, Pynson, Redman, and others, inaccurate in every respect, unedited, not compared with the Rolls or with the MSS., and put out centuries after the times of which they treat.

I would again urge on students of history the danger of using these books (which they may read for themselves in the British Museum) as authorities for historical theses, except where they have been properly edited by experts such as Horwood, Maitland, Pike and others. (See my *Manuf. Hist. Mat.*, p. 227.)

They are very valuable authorities, but it is not safe for the ordinary historical compiler to make use of them for supporting his conclusions. They were printed from MSS. of which Mr Pike, speaking from full first-hand knowledge says: they must generally be copies more or less imperfect, and many of them copies of copies.

To mislead a pupil by using such books where the edited Year Books suffice would be fatuously dishonest; it would almost be similar to writing an account of early sugar cultivation in Palestine from the text "Is there any treacle in Gilead?" or of the origin of second-hand clothing from the Breeches Bible.

The Year Books can only properly be edited by lawyers, and very few lawyers have the leisure or the interest in past history or the

intimate acquaintance with archaic law to undertake a very onerous editing of MSS. or early printed copies full of the technicalities of an obsolete legal system, matter of which only a portion bears upon constitutional or narrative history.

We must wait and hope, bearing in mind the lamentation of Pollock and Maitland: they should be our glory, they are our shame.

The documents written in mediæval Latin are almost the only ones which have received any careful modern editing; the term "palæography," as applied by compilers of history to such editing, means generally no more than some sort of acquaintance with this tongue. The neglect for the most part of any other is one of the chief obstacles to advance.

A great amount of this last work has been done, and very well done. But the pre-eminence of this language over the others necessary for historical research has resulted in stagnation, as it has led to the neglect of the other languages and to a narrowing of historical study to English history only.

This editing of mediæval Latin has made rapid strides since the publication of Stubbs's *Constitutional History* in 1875–8. The very completeness of this work and its weight of authority have led to a worship of Stubbs and to a conventional view of English history in the smaller political compilations, to the narrowing of history teaching in England to the views of English political history held at that tran-

sitional time. It has led also to the exclusion for the most part of any sources other than those from which the great archivist and historian of forty years ago drew his inspiration.

Stubbs is a landmark, a milestone, and history has sat down to admire the milestone and fallen asleep. It is time to get up and walk on, even if she has to take to Scandinavian or Celtic cross-roads.

To refer once more to the archivist (*Manuf. of Hist. Mat.*, pp. 225–240), the translating and editing of the old records is an expert art in itself, away from the writing of history, requiring a workman's knowledge of the archaic language. I understand that one man has recently spent twenty years in so editing the muniments of Westminster Abbey.

Very few historians even of the first class have the aptitude for the work of the archivist, the leisure, the patience, the meticulous care for accuracy of detail; very few archivists have the style and the knack of happy omission necessary for the historian. There are exceptions, men like Hallam, O'Curry, Burton, Joyce, Maitland, and some living men, English historians as well as such men as Bemont, who can combine two antagonistic professions.

Bishop Stubbs himself was not only one of our few really great historians, but our greatest historical critic. But such men are rare exceptions; for the rest, those at the top are those who hold entirely to the one art or to the other.

To go back to the records, in addition to all these sources of history which I have mentioned, accessible or not to the student, there are now at our service for legal and political history series of the records of local courts of all kinds, from comparatively early times down to a late date.

This last is a source of mediæval law ever increasing, and ever widening in scope, as all sorts of persons and societies edit local records, threatening to overwhelm historical investigation by the sheer mass of matter to be dealt with by the historian. It is for the most part accessible, being in Latin or English.

I have therefore in this book only pursued my inquiries in one direction—law and custom, so far only as they relate to tort, crime, and police. But I must premise that, at the time of which I am writing, there was hardly any distinction between civil and criminal law as such. All acts which called for settlement were wrongs — torts, as they are called in English law.

These records of the lesser courts cover much the same ground. But although they contain a very great deal of vain repetition, they are not by any means unattractive. I have only quoted from a small number of them.

In drawing illustrations from modern affairs to contrast with mediæval conditions, I have been actuated by no desire to put forward political or social opinions. "I aim neither at

sceptre nor crozier nor at popular dotage." I chose those nearest at hand, and fittest, as it seemed to me, to point out the contrasts and likenesses of the two periods. But when commenting on them, as all of us are now thinking of the future, I did not refrain in the Supplement from putting forward personal opinion and suggestion.

All mediæval customary law, whether it regards torts, crimes, or police offences, is in itself interesting and occasionally humorous. If one can put to one side the thought of all the misery and suffering which lie behind the records, one cannot help being amused with the drollery of some of the items, so beautifully unconscious in the light of our after-experience, as where a man accuses another of slandering him by calling him Robert le Brus "to his despite."

Dry or humorous, the records are not by any means antiquarian literature; our present law of crime, especially our police law, is conservative of mediæval customs and practice in administration, and closely imitative of the grotesque fancies of the past in the invention of new offences or in the procedure used for their prosecution.

Human nature being always the same, the modes of dealing with it vary little in the ages, despite the verbiage in which the rewarming of old matter is disguised. Both in matter and in method the old custom may be placed with profit by the side of the modern instance, not

always to the advantage of the example of the present day. Every age, whether seed-time or harvest or plain fallow, thinks itself wiser and morally better than the one that went before, and from the height of its superiority looks for a speedy millennium as a consequence of the temporary practice of its day. And yet human nature remains the same; "expellas furcâ tamen usque recurrit," as the Eton Latin Grammar says.

Apart from its own merits as mental food or recreation, the development of our present legal administration from mediæval justice work, and the relation of early criminal law to the political and social conditions of these modern times, forms a study of historical value, especially as we view the variations and occasional reactions on the way.

There has been an absurdly distorted view of early mediæval society given from the habit of the historian of representing the English king as an intolerable tyrant from whose iniquities some patriot delivered a devoted people—a view which may to a considerable extent be corrected by a study of legal records.

They will show us in the first place that the king, instead of being, as he is so often represented, an independent legislator, who imposed his arbitrary will on his people, was bound by customary law made by them, which he could not alter or abolish without their consent.

"Sire," runs the coronation oath of Edward

III., "grantes vous a tenir et garder les leyes et les custumes droicturellez lesquiels la commonaute de vostre Reame aura esleu et les defenderes et afforceres al honor de dieu a vostre poer. Je le grant et promit." We have a draft in the hand of Henry VIII. showing how he proposed to modify this absolute promise. It runs (with his interlineations [ ] and excision ~~folk~~): "And he shall graunte to holde the lawes and [approvyd] customes of the realme [lawful and nott prejudiciall to hys crowne and Imperiall duty] and to his power kepe them and affirme them which the ~~folk~~ [noblys] and people have made and chosen [with his consent]" (printed in Sir Henry Ellis's *Original Letters*, 2nd series, vol. i. pp. 176–177, and frontispiece).

But when Laud was unjustly accused of altering the coronation oath of Charles I., the oath was still in its old form: "Concedis justas leges et consuetudines esse tenendas et promittis per te protegendas quas vulgus elegerit secundum vires tuas. Concedo et promitto."

Further, a review of the records of the many local courts, especially of the regalities of Scotland, shows us that, however much the king might wish to alter the custom in his favour, his powers, even in the administration of this customary law, were closely limited by the almost equal powers of the great lords both lay and ecclesiastical.

Writing in the reign of Henry III., when

the papal influence was high, when the reaction from the anarchy of the baronial revolts of John's reign was leading the lawyers to exalt the authority of the Crown, Bracton, the Court lawyer, writes (II. 16, iii.): "The King has a superior, for instance God, likewise the Law through which he has been made king. Likewise his Court, namely counts, barons, because the counts are so called as being as it were the associates (comites) of the king, and he who has an associate has a master."

A perusal of the records of the various courts and of the bodies of customary law shows that the king's authority, even in the most imperial days, until the Tudors and the Stuarts trampled on all freedom, was limited by the authority of his comites, of whom he was *primus inter pares* only, and that the powers of the comites themselves were kept under control only by a well-organised system of distrust both from above and below.

It is a distrust which is the only peaceful solution of the perpetual struggle for free institutions, for free speech and free action. But to be healthy it must be a distrust founded on a knowledge of the foundations underlying social existence, as they regulate an imperfect world.

Otherwise, if such distrust only voices the insane belief that isolated acts of tyranny or covetousness can be avoided by setting one class of men against another, we are plunged into the whirlpool of reaction and rebellion

which has been defined as despotism tempered by revolution.

It is difficult wholly to separate even mediæval criminal law from the penalty of political failure. I do not propose to touch on such a subject further than to devote a few pages in the first chapter to a consideration of the general principles on which law is founded.

J. W. JEUDWINE.

April 1917.

TORT, CRIME, AND POLICE

Part I

CHAPTER I

GENERAL OBSERVATIONS ON CUSTOM AND LAW

THE word "law" is used in this book only in the narrow sense of regulations made from time to time in a community to regulate its internal affairs; such uses of the word as "moral law," "law of nature," and "law of the universe" being ignored.

Custom is regulation made by the community itself, as opposed to laws which may be imposed by force upon it from without, as if the Germans gave law to the British; or opposed to temporary rules made in response to some passing pressure of national necessity or some convenience of administration.

Custom has at all times a greater force by far than law, and a more continuous sanction, as it expresses the will of the community in which it originates. It is only when it is

sought to confine custom within limits, or to change a habit which has hitherto recommended itself to the community, that it needs to be written down as law.

Where a custom is admitted, based on common consent, very little sanction indeed is necessary for its enforcement; when law is imposed from without, it rests solely on the military power at the disposal of the ruler to have it obeyed. Even then it only remains law so long as it recommends itself to the community.

Law at its best is only an alternative for physical force, resting for its satisfaction on the force behind it. If the law is not respected, if it does not commend itself to the good sense of the community, although the federal power may be strong to enforce it, there will be disorder and evasion and contempt, and from time to time a return to physical force. Such a return brings with it much suffering to those who dare oppose the law, who may be strong in moral though weak in physical sense. When this occurs it becomes a question of endurance. As Dr Johnson put it, the magistrate has the right to punish; the man or woman who refuses to obey has the right to suffer. Martyrdom is the test. But it is a poor way to settle moral issues, whether for individuals or small nationalities. It smacks of the Prussian.

It was of old time an assumption which underlay all declarations of ancient custom,

so far as these superseded violence, that they were made by the unanimous consent of all, the clash of all the spears on all the shields. When such an unanimous agreement was proposed, the parties came armed to the meeting; if agreement failed, the matter had to be fought out.

The Majority Principle.—Law as it superseded physical force gradually grew to be coincident with the majority principle, the binding of an unwilling minority to a change by a declaration of new custom. This was in the nature of a treaty, such as Magna Charta, an agreement arrived at in the place of fighting out the matter.[1]

As fighting results only in a decision as to comparative force, except so far as any action can be referred—as we believe that the action of the nation in this present war can be referred—to an instinctive moral sense, there

[1] A striking example of the occasional reaction to primitive methods is the refusal to the Irish Roman Catholics—who had loyally supported the long firm of Liberal, Labour, and Welsh Calvinists for some ten years, enabling them to destroy the Welsh Church and the House of Lords—of the Home Rule statute passed without qualification, on the ground that they and the Ulster minority, who had throughout most bitterly opposed the measure, must be unanimous, which was impossible. Such a procedure, of which the Ministers cannot have contemplated the effects, was a reversion to primitive savagery and the brute force of times before law. It overthrew at one blow all law, all police, all parliamentary procedure, all settlement by consent. It was the abandonment of the majority principle, inviting the appeal to force.

has gradually arisen in national affairs, subject to occasional revolutions and reactions, this system of law-making, of deciding heated questions by the submission of all to the will of the majority.

It is not generally sufficiently impressed upon historical students that the system only took root very slowly and uncertainly, as can be seen by even a casual study of mediæval law.

The records of early law by the side of the chronicles of events will show how easily upset was the balance between force and argument, and the danger and difficulty which, when the regal power was weak in itself and poor and compressed by difficulty of transit, attended the efforts of kings to compose differences on the majority principle without recourse to arms. They put the kingship in an entirely different light from that which is reflected on it as the king appears as the all-powerful Basileus in the pages of the Roman monastic historian.

Constitutional History.—Unfortunately history has seldom taken pains to concern itself with the social state. The policy of the English Government, says the preface to Selden's *Discourse of the Laws and Government of England*, is "wrapped up in a Veil of Kings and Wise men: and thus implicitly hath been delivered to the world by Historians who for the most part read Men and wear their Pens in decyphering their Persons and Conditions: Some of whom, having met with ingenious

Writers, survive themselves, possibly more famous after death than before: Others, after a miserable Life wasted, are yet more miserable in being little better than Tables to set forth the Painter's Workmanship and to let the World know, that their Historians are more witty than they, of whom they wrote, were wise and good. And thus History, that should be a witness of Truth and Time, becomes little better than a Parable or rather than a Nonsense in a fair Character, whose best commendation is that it is well written."

Lest I be adjudged blameworthy in applying to our historical authorities the thoughts and ideas of an acute lawyer of the seventeenth century, I call to my assistance the language of a lawyer of our own time. Commenting upon the anonymous historians who had, on the strength of passages in a Parliamentary Report, attacked the character of a dead soldier, Mr Asquith (20th March 1917) used language which might be aptly applied to much of the material used for our constitutional histories: "I suppose that upon no man in history has a heavier burden fallen than fell upon him, and nothing has filled me with more indignation and disgust than that the publication of criticisms of Lord Kitchener's conduct and capacity" (in the Report) "should have been taken advantage of by those who only two years ago were in a posture of almost slavish adulation, to belittle his character and to defile his memory."

If asked how this incursion into modern politics affects the study of customary, criminal, and police law in mediæval Britain, I answer by quoting further the language used by Mr Asquith, language which any historian may well lay to heart:—

"It is easy to make war after the event, when all the doubts and uncertainties and possible contingencies of an undeveloped future are translated into the rigid lineaments of accomplished facts."

"What you want in dealing with a situation of this kind is a little imagination and perspective, and to put yourself into the position —the actual position—of the men who were dealing on the spot, and at the time, with all the uncertainties of the future in what was going on and what was likely to happen. . . . We ought to remember with gratitude those who have served us, rather than turn to criticisms of those whose conduct you think may have fallen short of what might have been expected": a sentence which may be applied equally to the disastrous delay and dangerous disposition of power of the politician as to the active decision of the military leader.

Imagination and perspective—to attain them an acquaintance ever so cursory must be made with the social conditions of the times as expressed in the records of custom and law. It is in the law courts, at the hands of just and unjust judges, that liberties are won and lost; it is in the law courts, especially in times long

remote, that the proper perspective for current events can be obtained by a knowledge of the social conditions which accompanied them.

So long as society is natural, so long as men are bound by social ties because of social needs, there is no necessity for the revision of the faiths of our fathers, for the relearning of the principles on which society is founded, as the foundation of social life is instinctive. But when society becomes artificial, when "the freemen formerly holden together like cement in a strong wall are left like a heap of loose stones, or so many single men scarcely escaping with their skin of liberties, and those invaded by many projects and shifts in Government and State offices"—it is a seventeenth-century writer who speaks—when this occurs men have to go to school and learn from the beginning upon what foundation their social liberties rest.

Records of events, written by secluded men, who had no first-hand knowledge of them, may be a necessary basis for history since we have no other. But to put oneself in "the position—the actual position—of the men who were dealing on the spot, and at the time, with all the uncertainties of the future," one must supplement by a study of the conditions under which they worked, and to that a study of the criminal and police customary law of the Middle Ages may be a help.

To turn, then, for a few moments to law as it affects political life, as it affects the powers of

the rulers of the people—the boundary, as Pym defined it on Strafford's trial, the measure, betwixt the king's (that is, the ruler's) prerogative and the people's liberty.

The Political Constitution.—The Constitution, as it is called, the adjusted balance of opposed forces, obtained by long and often painful experience, intended to control, so far as human prescience may, the baser passions which always threaten society and which may at any moment and from any quarter disturb the balance so obtained, enabling the settlement of difficult political questions by precedent, an arbitration between two conflicting interests which otherwise could only satisfy their differences by force—this Constitution is custom not law, a custom almost entirely unwritten and varying from day to day, the law, where it deals with or is affected by it, varying with it.

So far as any of the principles which underlie our form of government rest at all on written authority, such authority is for the most part the mere milestone of the past—statutes or resolutions either wholly obsolete like Magna Charta, or repealed by judicial decision like those clauses in the Bill of Rights relating to the power of the people to petition the king which were repealed by the judges in the case of Pankhurst v. Jarvis, as they interfered with the police doctrine of obstruction.

No. Constitutional law rests on force only, "the boundary between the ruler's prerogative and the people's liberty" to be adjusted tem-

porarily by the physical force but permanently only by the moral force at the disposal of either. It is unwritten, and it varies according to the necessity of the people and the honour of the ruler.

At present we have of necessity surrendered all the liberties which we have ever won and enjoyed as a free people into the hands of a committee of five men, hoping that, when the occasion which called for the sacrifice has passed away, they will be honourably returned to us.

The urgency of the necessity and the measure of the public consent may be gauged by the unanimity with which the great sacrifice has been made.

The Constitution is not, as some readers of Constitutional history may imagine it to be, a solid, cumbrous piece of seventeenth-century furniture, of which some past king has broken off a leg, and another the handle of a department. It is a fluid conception of the powers and safeguards necessary for good government, varying as circumstances put pressure on any part of it.

If anyone tells you that the king is not in reality able to do some act which in theory is done by him, because it would be contrary to the Constitution (and you will often hear this kind of thing), let him tell you what Constitution he means. Is it the Constitution as it existed when King George I. ceased to sit with his Cabinet because he had so little

knowledge of the English language? Or when King George II. answered Walpole's request for commissions for M.P.'s to influence votes in the House of Commons, "No, I won't do that. I will order my army as I think fit; for your scoundrels in the House of Commons you may do as you please" (Hervey's *Memoirs*)? Or when the powers of the American President were modelled on those of King George III.?

Does he mean the Constitution before or after Catholic Emancipation, or the Union or the Repeal of the Union with Ireland, or the Reform Bills of 1832 or 1867, before the introduction of the closure, of the closure by compartments, of the Kangaroo Closure, before or after the passing of the Parliament Act?

As Sir Henry Maine points out in his *Popular Government*, of all the infirmities of our Constitution in its decay there is none more serious than the absence of any special precautions to be observed in passing laws which touch the very foundations of our political system.

There is only one safeguard of the Constitution or of Constitutional Law — eternal vigilance as the price of liberty, and as the corollary of eternal vigilance a generous appreciation by the people of the difficulties faced by their rulers.

Crimes against Morals and Police Regulations.—The suggestion that laws hastily made by a delegated assembly, very often in view of a merely temporary necessity, may affect

unfavourably the foundations of our State, points to another aspect of treatment of law, which can be illustrated throughout any survey of mediæval custom—the distinction between crime and police law, between those matters which do not rest on common consent but on occasional or immediate necessity, and those primary rules which commend themselves as essential to all civilised mankind.

That offence, says Coke, commenting on the Statute of Monopolies (*Inst.*, iii. 181), which is contrary to the ancient and fundamental law of the realm is *malum in se*. But what were the ancient and fundamental laws of the realm, and what was their origin? The discussions and the writings of the time show that the difficulty of obtaining a decision on such a subject was increased by a misconception as to their origin. They attempt again and again to define law. The law, says Pym, is "that which puts a difference betwixt good and evil, betwixt just and unjust"; "the common rule," says Eliot, "that prescribes to everyone their duty"; "the rule of things to be done and omitted," and many platitudes of like kind. It is when they attempt to deal with the origin of these fundamental laws that confusion comes.

I quote these seventeenth-century patriots and lawyers for a good reason. Their patient effort to make a legal settlement of the disputed matters between the people and the king by the arbitration of the courts without

violence is one of the most pathetic chapters in our history. It is largely overshadowed in our histories by the more dramatic words and actions of the extremists who were indifferent to a peaceful settlement.

The prolonged argument is the more pitiful because, while fiercely opposed to the principles of the Rome of their time, they were so completely under the influence of Roman legal ideas that they had absolutely lost sight of the fact that the ancient and fundamental laws for which they were fighting were not in the first instance *quod principi placuit*, but customs agreed to by the people in council with their sovereign and his chiefs.

They fully recognised that "if you take away law, all things will fall into confusion"; that law was "the basis and just necessity for all authority"; that "all empire and authority rests on the obedience of the subject, and the true form of obedience is comprehended in the laws." They had determined that the king, who claimed to be above the law, should with them obey the law.

But throughout the struggle the lawyers were handicapped by the theory of the king as apart from the people as the fountain of justice, the origin of law.

So instead of the descent of the common law from the common agreement of the people in times long past, they strove to derive its principles from a source where they would never find it—from the edicts of the Roman

Emperors. Throughout their writings, as for instance in Sir John Eliot's *De Monarchia* and *De Jure Majestatis*, a procession of Roman and Græco-Roman emperors passes across the page, just as nearly three centuries previously Pierre de Fontaine had tried for St Louis to deduce the customs of the Vermandois from the same source.

Yet in the mediæval law records you may almost see the commencement of the struggle: you can see the change as the king and baron, the man in power for the time being, slowly and gradually depressed and ousted the free-man from his power to make the laws which he obeyed, and from his position as judge in the courts where they were administered. Even at the time when the English struggle for political power took place, the suitor was not wholly without the means either of originating the laws or of administering them.

It is a struggle which is never wholly absent from history. A Parliament now, if it claims to set itself up above the laws and can count on the support of the judges in the courts, needs just as careful watching as the king of the thirteenth or seventeenth century.

Early Law rested on Status.—It was easier in those early days to control the ruling powers because the customs rested on a factor which is of the essence of all free early society—status, the limitation to certain individuals, as representing communities, of the power to contract and the power to receive or impose a penalty.

In our own time this inequality before the law is confined almost entirely to women, as a survival (which a minority of powerful men would not willingly see disappear) of the days when each family in all matters of customary law was represented by its head. For example, a woman, although she cannot obtain, like a man, a divorce for adultery only, may on the sole word of a policeman be sentenced by a magistrate, from whose decision there is no appeal, for addressing a man in the street; while a man can with safety address a woman. Or, to take another instance, the husband, subject to certain statutory modifications, remains liable for his wife's debts, as a reminder of the times when under feudal law she with her possessions passed as a chattel on marriage.

In the times of which this volume treats, this matter of status pervaded all law and custom, legal process resting in the head of the family alone, as was the custom, I believe, in Russia until late in the last century, and even later in Serbia and Montenegro. This matter of status is indicative of what forms the strongest contrast between our own and the mediæval communities, their idea of common responsibility for the acts and defaults of members of the society.

War the Normal Condition.—Another characteristic of mediæval conditions was that war close at hand was the instant and normal state, so that obedience, the one great military

necessity, came easily as of course, qualifying very largely, even in the most revolutionary of times, the idea of modern democracy that freedom involves the right of criticism of military and political affairs by persons not in any degree qualified to form a judgment. As a consequence, mediæval society showed no resentment at the control of the affairs of life by the recognised leaders, which was the normal state of all society then, partially reflected in the abnormal conditions of our present times.

This condition makes easier the gradual transference to the leaders of the powers which they derive from and share with the freemen.

Mediæval Society ruled by an Aristocracy.—One other feature of mediæval society, agreeable to a condition of war and the conception of status, separated the society of the twelfth century from that of our day, if ours can in any sense be called a society—namely, that, whether it was in the stage of a community based on kinship, or on unity of religious faith, or on the occupation of a common soil, it was, while in essence a democracy in which local government had a supreme share, a democracy founded upon the principle of aristocracy.

Each man's place was appointed to him in the common scheme, the state of life unto which it should please God to call him, and over all the influence of a moral law by which we do not now even pretend to regulate

our affairs, the opportunities for altering or improving being then at their best sufficient to stimulate ambition but not great enough or frequent enough to excite to envy.

When men rebelled then against authority, it was against the misuse of the fixed conditions and not in the hope or expectation of change. Insomuch as each man standing on a marked level had specified rights and privileges, and the corresponding duties without which no rights in any healthy society can exist, there were not the same opportunities for despotic arrogance as in societies where all are depressed to one common level.

The mills grind slowly. But the retribution of political tyranny growing out of imperial democracy comes in the end with absolute certainty. It comes, as an uncontrolled, positive, unopposable force, so soon as the mass—the men who live for the day only by their hand, the men to whom the fortune of birth or of association has not given the wisdom or the joy of self-sacrifice which only comes to the few—accept, in the place of the moral sense which calls on men to give, the creed that they, the people, express Atlas, standing on the tortoise of aristocracy and supporting the whole world on his shoulders. "No doubt but ye are the people, and wisdom shall die with you."

"One of the chief drawbacks of modern democracy," says Maine, "is that while it gives birth to despotism with the greatest facility,

it does not seem to be capable of producing aristocracy" (*Popular Government*, p. 188), the rule of the best which is a necessity for securing the freedom of the masses of the people.

Liberty and Equality.—I do not know who was that odd person who first coupled together Liberty and Equality; one thing is certain, that they are opposed and irreconcilable terms. The only place in which I ever saw them with propriety placed together was in Paris after the Commune of 1871, over the gates of Père la Chaise. There can be no liberty without inequality; the mere effort to reduce mankind to one level destroys freedom.

To take an example, the reign of Justinian cannot be said to have been an era of any kind of liberty. But in his *Institutes* (I. ii. 2), distinguishing the *jus civile*, the *jus gentium*, and the *jus naturale*, he says of war and slavery that both "sunt natura juri contrariæ: jure autem naturali ab initio omnes homines liberi nascebantur."

As the free savages from the East making their own laws crowd down upon the decaying Empire, they prove the falsity of Justinian's theory, building up a society in a succession of rising tiers, with the king at the head and the slave at the base. Very soon side by side with it grows and stands the like pyramid of the Roman Church, with the "servus servorum Dei" of the triple crown completing it.

This condition, in which there is much

liberty but no pretence of equality, lasts in a measure for a long time. But in the fourteenth century the kings, who have gradually consolidated the federal power, begin again to use the language of Justinian. Louis X. of France in 1315 issues an ordinance reciting that "comme selon le droit de nature chacun doit naistre franc . . . nous considerants que nostre royaume est dit et nommé le royaume des Francs et voullant que la chose en verité soit accordant au nom," proposed to raise money by selling freedom to the serfs on his demesne lands on good and easy terms. The serfs not wishing to better their condition on the king's terms, a further order reciting their ingratitude directed their goods to be seized "pour l'aide de notre presente guerre" (*Recueil des Anciennes Lois Françaises*, par Decrusy, Isambert, et Jourdan, vol. iii. pp. 103–4). They were finally enfranchised in 1779 by Louis XVI.

Come down some three and a half centuries, and, when the power of the French king was at its height and all the liberties of the French people waiting for the inevitable revolution lay in his hand, Montesquieu in his *Esprit des Lois* returns to Justinian: "Comme tous les hommes naissent égaux, il faut dire que l'esclavage est contre la nature."

Another century or so later, just before the French savages had soaked liberty in blood and flame, the philosophic politicians of the American colonies, seeking to justify their

break with the Mother Country, took the old foolish tag and used it for their Declaration of Independence. They asserted the equality of man. But unhappily they were themselves large slave-owners, so they left the corollary to the proposition to be hammered out in the next century by a bloody civil war.

And now, by voluntary sacrifice in this country we have come as nearly to equality as can be possible for any people. But to attain the equality of effort, the equality of self-sacrifice, we have willingly submitted to the loss for a time of all the liberties and of all the ideals of liberty on which we plumed ourselves.

For the future—what may we look for in the future? It is in great part dark for all of us, and yet there is one very bright light which illumines the whole. Our politicians have not wholly forgotten the meaning of being leaders. There are men in the present and in the former Ministry of aristocratic birth and training, whose class and all that it stands for has been in the past the target of attack both from the late and the present Prime Minister. When peril came, the danger to the country drove out the soreness of heart of the former time; recognising the ability of the chosen leaders, such men took subordinate office under them for the public good.

It is surely not possible to believe that serious political disaster can overtake a country

when the best—if only ἄριστος was a plain word to the common man!—whether in or out of office, set the example of good-fellowship and self-restraint; when the highest legal authority is a great lawyer who accepted office on the condition that he should *not* receive a pension if the Ministry resigned.

There spoke the true aristocrat; there the very highest tradition of the English bar.

Whether in the time to come we can retain the freedom which we have, or can regain what we have foregone for military necessity, will depend upon the degree in which we can secure, or our leaders can secure for us, that the criminal law, which, apart from revolution, is the measure of authority, shall be honestly and equitably enforced against all persons, even the highest, in all matters, from treason to the State to the smallest infringement of police regulations founded on fiction.

England, said Sir Robert Philips in 1625, is the last monarchy that yet retains her liberties. . . . Let them not perish now. Let not posterity complain that we have done worse for them than our fathers did for us. Their precedents are the safest steps we tread in. Let us not forsake them, lest their fortune forsake us.

Part II : Stationary Society

CHAPTER II

UNWRITTEN CUSTOM AND ARCHAIC LAW

I AM well aware that it must appear a far cry from the generalisations of the last chapter—which may receive censure as introducing contemporary matter—to a survey of mediæval law. But I have an incorrigible belief that history as an antiquarian study is of little value, inferior to stamp-collecting or the cinema, and that the story of the past, to be of any use as a guide for the present, must be related with reference to the affairs of the present, the reader judging for himself whether the evidence produced justifies the verdict asked for by the compiler, who, even when most unconscious of it, is always an advocate, never an impartial judge.

A view of the antique customs and of the legal doctrines which were in use in the British Isles in early times, their origin and the modes of living which they represented, is of greater value than any other department of historical study for obtaining a due perspective of historical facts. Such study displays to us the forms and springs of action of the societies of past times, and gives us the bearing of the past on our present social troubles.

Almost the whole of our present legal system rests on the supremacy of the English common law, which, modified by Roman science, has its roots deep in the past. To this general statement there are exceptions. At the present day Scotland has law peculiar to herself, developed, as she passed from archaic custom, through her antagonism to English institutions resulting from the Edwardian wars of the thirteenth to the fourteenth centuries. Attracted to France as an ally against English aggression, she evolved as the law of Scotland a hybrid Franco-Roman law differing from that law of England which, when England had crushed and destroyed the unwritten Brehon customs of Ireland, Man, and Wales, became the law of the rest of the islands.

The Colonial possessions, again, generally introduce as part of their legal system legislation adapted to different conditions of climate, soil, or society ; while in the Eastern possessions, such as India, laws made by British pundits in the eighteenth and nineteenth centuries, largely in ignorance of the past social development of the people, have overlaid and conflict with the most ancient and elaborate body of custom with which we are acquainted.

Luckily for the Empire, our earlier official class in India, both civil and military, was largely recruited from the cadets of Highland and Irish houses, from societies which had hardly thrown off the social conceptions which lay at the root of Indian life. The results

have not been so bad as they might have been if commercial England alone had administered, or, as she has done in Ireland, had swept to one side, the various customary laws of India.

The Influence of the English Common Law.— But with such exceptions the social relations of all the peoples of the vast British Empire, as well as those of the people of the United States, are to-day regulated, both in respect of the principles involved and of the procedure for the enforcement of the federal will, by judicial decision and legislation founded on the English Common Law, a traditional, unwritten customary mass of social regulation.

It is in part communal customary law almost unseen under its covering of feudal custom, influenced throughout its course on one side by the Mosaic code, and on the other by the legislation of the Roman proctors and emperors and the mediæval commentators on Roman law. Through the Year Book reporters, through the decisions of the Justices of Eyre, through the commentaries of the great English jurists on such decisions, the unwritten custom gradually solidifies into the written law which becomes embodied in statute.

I will touch on a few of the principal features of the old customs, the sources of development of the later law; and upon the alterations in procedure which, as the society passed out of the communal stage, operating far beyond the scope of the original intention, acted as the agencies of a silent revolution.

No Archaic Criminal Law.—The unwritten customs to which we shall refer deal almost solely with what in modern days would be called criminal and police law, with the qualification only that, when we go far back, there is no department of criminal law as such away from what we class as civil matters; the regulation of all social affairs, from the gravest murder to the small breach of contract or the careless tieing of a dog, was the subject of a local police law of which the procedure and the remedies were indifferently applicable to all.

In the most archaic forms of social life known to us in history the vendetta is the only law, as it was in Montenegro until 1855, and in old Serbia and Albania even now (see *Serbia by the Serbians*, pp. 187–90).

The only case in which the society acknowledged any obligation to interfere was where the act, such as cowardice in battle, affected the whole community. Otherwise, when any sort of interference began, the society left to the individual affected, as in European war at the present day, the duty of setting in motion any agency apart from personal violence which might exist to right wrong committed by one member of a community against another.

The Responsibilities of Kinship.—Another characteristic of ancient police law is this, that the act of the individual affected not only himself but the whole community, who were his kinsmen; so that when society began to

effect a settlement the matter was conducted not between individuals who may have been the persons directly concerned, but between the heads of the communities acting for the individual members both as leaders and as sureties for good faith.

If the chief, representing the local community, offers his services between the parties to prevent bloodshed, it is subject to their refusal of any interference in their right of vengeance. "That, too, I lay on both ye brethren my earls," says the Norway king to the earls of the Orkneys, "that ye take an atonement from Thorkell Amundson for the slaying of your brother Einar, and I wish to lay down the terms of the atonement if ye will say yes to that" (O.S., 27). The acceptance of the offer by the chiefs was voluntary. They could refuse to compromise if they had been willing to brave the king's wrath, ignore his influence, and enter with their respective followings into the vendetta.

Such a condition of partial control of individual lawlessness did not refer to killing only, but to all questions of difference over right of pasture, or user of springs, or remedy for past grievances, which arose in a primitive community.

In all early society the line between the intentional killing of a man, provided it was done after notice and in fair fight, or the ravishing of a woman, and the trespass of a cow on a cornfield, or the rooting up of

the pasture by the pigs of a man of another group family, was a very fine one.

Moreover, as disputes as to the ownership of land invariably led to acts of violence on both sides, and as contracts for the purchase of cattle or other goods were liable to be impugned on the ground that they had been stolen, there was no difference of procedure or of penalties between acts of culpable and intentional violence and trespass or want of title.

All such acts, whether deeds of savagery and violence such as we now call crimes, or breach of contract, or neglect of social obligation such as trespass, were treated in one category as acts of wrong or torts, breaches of good neighbourhood, violations of the social conventions which bound men together.

Until the Church dissociated them by introducing the conception of sin, declaring a scale of wrong in which, unfortunately, breach of contract, the greatest of all crimes against society, but which did not appear in the Decalogue, stood on a lower level than the killing of an individual, there was no criminal law so called, and certainly no civil law, the penalties for the abuses of civil rights being of the same nature as those for what we call crime.

Sanctuary.—When we first see this very tentative and partial system of communal control of the individual in operation in the Mosaic codes, it is effected not by any judicial decision on the facts, but by the granting of a

right of sanctuary to the man who had committed the breach. Apart from this, in the first instance the offender must defend himself against the next-of-kin with whom rested the obligations of revenge. "The revenger of blood himself shall slay the murderer" (Numbers xxxv. 9 *et seq.*) –the so-called murderer including as well the man who kills another by accident as an actual secret slayer; "when he meeteth him, he shall slay him" (*ibid.*, ver. 19).[1]

There was unrestrained licence to kill your enemy. The utmost that the Oriental lawyer, speaking with the voice of inspiration, would do for the man who, having by accident killed another, fled from vengeance, was that he laid upon the community that they should provide (ver. 12) cities of refuge from the avenger, with a view to a possible arbitration, when blood had had time to cool, by the congregation.

But in one of these cities the unfortunate must remain until the death of the high priest. If he leaves his refuge and the revenger of blood finds him (ver. 27) without the borders of his city of refuge, "and the revenger of blood kill the slayer, he shall not be guilty of blood." (See the somewhat similar case in the laws of William the Lion, mentioned in my *Manufacture of Historical Material*, p. 203, last three lines *et seq.*)

[1] There is, I understand, no distinction in the Hebrew tongue between our modern term "murder" and accidental or justifiable killing.

A more sensible and humane satisfaction had evidently been suggested, but negatived, for the Mosaic law goes on to say (ver. 32): "Ye shall take no satisfaction for him that is fled to the city of his refuge, that he should come again to dwell in the land, until the death of the priest." Apparently the very confused provisions of vv. 15–25 had given rise to doubt, since in the commentary of Deut. xix. 4 *et seq.* the case of the slayer who had killed his neighbour ignorantly is again considered, and his case (ver. 11) separated from that of the deliberate manslayer, who is to be fetched out of the city of refuge and handed over into the hand of the avenger of blood that he may die, but whether to be killed by him in cold blood or to fight it out is not explained.

This system of giving a privilege of sanctuary to certain places plays a great part in mediæval laws, as customary laws treating of acts of violence are modified in accordance with the law of Moses; it becomes a valuable privilege of the kings and of the Church, the king's peace and the Church's right of sanctuary; and it is a salutary check on hot blood. (See *infra*, p. 102 *et seq.*)

Wrong Satisfied by Damages.—When we first view our early Western society, it has advanced far beyond these primary conceptions of the Oriental migratory pastoral tribes, and it has settled on the communal ownership of land.

As a result, the custom had arisen that all such acts, whether crime, tort, or breach of contract, were alike satisfied by damages, by payments in cattle, or by seizure of the offenders' interest in land, physical penalties being used only for offences which put a man outside the bounds of communal morality, such as secret premeditated killing, or stealing from a member of his own society.

A single example of the common case of accidental killing provided for in all the collections of laws will show the great advance made on the moral conceptions of the Israelites by a system of payment for wrong done.

The commonest instance for which sanctuary was provided (Numbers xxxv. 22; Deut. xix. 5) was the possibility of death through misadventure when cutting down trees. The tree may fall, with the last blow of the axe by one, on another; the wedge which holds the axe-head safe in the handle may slip out; the axe itself may glance and strike the fellow. Under the Mosaic code the man by whom this misfortune has happened must fly for his life to the nearest city of refuge, and remain there until the high priest dies.

Payment in any such case to the next-of-kin is provided in the ancient British laws.

There are a great many such examples of accidental death or injury given in all the laws.

"If at their common work one man slay another unwilfully, let the tree be given to the

kindred, and let them have it off the land within xxx. days; or let him take possession of it who owns the wood," say the laws of Alfred (chap. xiii., Thorpe).

"The person who fells the tree is exempt from its fall, but so as he first gave notice of it," say the laws of Ireland (*A.L. Irel.*, iii. 225).

There is a collection of cases of accident in *L.H.P.*, xc. 11; and in *A.L. Irel.*, i. 175, treating of procedure in distress; *e.g.* "for scaring the timid, for carrying a boy on the back into the house," *i.e.* in case he should be injured by striking something hidden in the thatched roof.[1]

"If it happen to a person in throwing at anything that what he throws should in the rebound hit a person, so as to cause death," he pays galanas but not saraad (*A.L.W.*, Anom. v. 1; II. 15). "If two persons be walking through a wood, and a branch by the passing of the foremost should strike the eye of the hindmost unwarned: let him be paid for his eye if he lose it; but if the other warned him, he is not to pay" (*ibid.*, v. i. 24).

Owing to the influence of the Mosaic code, death or injury by accident or in self-defence continues for centuries in those parts under

[1] *A.L. Irel.*, i. 142, evidently treats of a decided case where such a thing had happened. It gives as one of the subjects of distress "the hook of a widow's house," the commentary saying, "*i.e.* an iron hook, *i.e.* its head bent under it; it is kept under the rushes, *i.e.* the thatch, in the house of a widow, *i.e.* a bill-hook or pruning-knife for cutting ivy or holly."

Roman influence to be treated almost on a level with murder. *E.g.* (*S.P.C.*, 31), Robert, arrested for having in self-defence killed Roger, who had slain five men in a fit of madness, is committed again to custody (the record does not say how long he has already been in prison), "for the king must be consulted about this matter" (and *ibid.*, p. 67).

Or, as another instance (*Som. Pl.*, No. 282): "Mabel was playing with a certain stone in Yeovil, and the stone fell on the head of Walter, but he suffered no harm by the blow. He died afterwards within a month from sickness, to the effect that she in fear fled to the church. The jurors say positively that Walter did not die from that blow. Therefore let her be in custody until the king be consulted." If the king happened to be in Aquitaine, she might very likely remain in custody for years.[1]

The most grotesque example, perhaps, is the following, quoted by P. and M., ii. 474, from Kovalevsky, *Droit Coutumier Ossentien* (Customs of the Inhabitants of the Caucasus), p. 295. If a gun went off in the hands of a thief who was carrying it away, and killed

[1] "Se li peres ocit son fil par mesaventure, face sa penitence que sainte yglise li enjoindra," say the laws of Normandy (*T.A.C.N.*, c. xxxv. 1). There is a similar provision for accidental deaths among kinsfolk (*ibid.*, 2 and 6). "Se li homs ocit son segnor se ce n'est par mesaventure, il en receve mort" (*ibid.*, 4). There was no doubt often a very fine line between felonious killing and misadventure. It was safer always to kill the man who killed his lord.

him, the thief's heir had a just feud against the owner of the gun.

A man was liable for the acts of his slaves and beasts (see *A.L. Irel.*, iv., as to bees, dogs, fowls, etc., and Exodus xxi. 28–32, 35, 36).

Deodands.—If an animal or some inanimate thing killed or injured a person, as where a horse threw a man, or a wheel came off a waggon, or by the action of the wind a tree fell on him, the animal or thing became, somewhat on the principle of the scapegoat, a devoted thing, a deodand, and as such was one of the king's perquisites, or was handed to the Church. Where a woman fell into a tub of boiling water (*S.P. Cor.*, 15), the tub is deodand. Where a man is killed by the fall of a lump of earth in a mine, the king gives the mine away as a deodand, but the judges decide that only the lump of earth is the offender.

Often, in the anxiety to make something for the king, an object which has never offended is seized as deodand. When thieves come to a man's house to rob and murder, but are driven off and one killed, leaving their horses, the horses and harness are deodand (*S.P. Cor.*, p. 27).

A most unusual and illogical instance of a deodand is given in a case in *P.C. Glouc.*, 1221, Maitland, p. 98, No. 415. A man following the plough suddenly falls dead. His companion, who was holding the plough, knowing that he would be suspected of killing the other man and that suspicion meant death,

flies forthwith. The jurors say it is a mischance and that the man had epilepsy. The coroner has seized forty pence of the chattels of the man who fled, on the assumption that he was guilty. They are to be a deodand if he does not return. If he does, he may have the king's peace, and the chattels be returned to him.

The townships used to be amerced for deaths by accident until Hen. III., c. 25, 2; *e.g.*, *P.C. Glouc.*, No. 92: a boy is found drowned in the mill dam of Culne Roger. The sheriff takes eighteen marks from the township "pro illo infortunio" (see *ibid.*, Nos. 93, 171; *S.P.C.*, 31, 67).

In short, death, whether by misadventure or as the result of a fair upstanding fight, was looked upon everywhere as a subject for compensation on a fixed and arbitrated scale.

Murder.—But note that the ancient world made a wide distinction—much wider and more equitable, I think, than our present law—between death which was the result of a quarrel brought about by provocation, words or actions, and secret killing, the attack on a man unawares, an attack without cause of offence.

Murder, say *Les Etablissemens de S. Louis*, ch. xxv., is when a man or woman is killed in their bed, or in any manner for which they are not *en mellée*. "En sa voie porroit l'en un home murtrir, se l'en seroit si qu'il en morust sans menacier et sans tanciera lui et sans lui dessier." It was an especially hateful offence

when there was a secret disposal of the body. The story of Cain and Abel must have come home with especial force to the people of the Middle Ages. No crime short of cowardice in the field was looked upon with such hatred and contempt as murder.

The Irish law gives an especially long stay of five days after the seizure of goods in distress in the case of murder, on account of the enormity of the offence and the heavy character of the penalty; and the commentator adds one of those touches of modernism characteristic of the ancient Irish custom, that this penalty is exacted for the offence whether death has or has not ensued—that is, if murder was intended and the person left for dead recovered (*A.L. Irel.*, i. 185 *et seq.*).

A note, p. 6 of "Ancient Irish Deeds," by James Hardiman (*Trans. R.I.A.*, vol. xv.), tells (anno 1140) that "when Donald O'Ferral and several of his clan conspired to kill Tiernan O'Rorke, whom they set upon and grievously wounded; yet notwithstanding that he escaped with life, his eric was exacted from the O'Ferrals as if he had been killed." The Brehon's decree set out in the same pages, after reciting a raid in force by O'Conor and his people against Donagh, goes on to say: "but having beaten, bruised, and badly wounded the said Donnogh and Teig, therefore I said that they came (with intent to) kill the said Donogh and Teig, and that they (shall have) remedie and redresse as if they had been killed."

When the king's courts encroach upon the communal jurisdiction, this crime of murder is one of the pleas which appertain to the king, and round it grows up a curious law of murdrum and Englishry.

T.A.C.N., lxx., "Des Plez de l'Espee," gives as one of the pleas which appertain to the sword of the duke homicide secret (*en repost*) "que l'en apele murtre." When after the Norman Conquest secret killing of a Norman by a Saxon was very common, and the neighbourhood very naturally did not discover the criminal, the Norman king fined the hundred unless they could prove that the slain was an Englishman. As time went on, when the cause for such proof no longer existed, the law remained. It became necessary, if the hundred wished to avoid the murdrum, the fine for secret killing, where the slayer was unknown, that they should, according to the custom of the county, which varied, prove Englishry (*S.P.C.*, p. 98; *P.C. Glouc.*, 405, 439; *Som. Pl.*, 746, 756, 766, 774, 875, 879, 883, 913). The system was in use before the Norman time. *L.H.P.*, ii. 1, refer to the laws of Edward the Confessor. They declare that in case the murderer cannot be found, the vill, or if too poor the hundred, are to be mulcted in 46 marks, "of which 6 go to the parentes and 40 to the king." A similar practice has been in use in Ireland in our time to check agrarian murder.

Englishry was only abolished in the reign

of Edward III., when he claimed the crown of France.

Theft.—Theft, as an unsocial act which struck at the foundations of society, stood on a different footing from other offences. The thief who had his interest in the common land and his rights in his kinsmen's property seems to have been largely in the hands of the king, with whom the appointment of the common property rested.

Theft, *manifestum furtum*, was, as in the earlier Roman law, one of the causes of enslavement; to steal from your own clan was a mean action unworthy of a freeman.

The method of dealing with this offence follows very generally the Mosaic law of Exodus xxii. 1–8 and Deuteronomy, which may be said to represent the typical provisions of primitive society. If the thief was caught in the act he could be killed on the spot, but not afterwards in cold blood, as he was a valuable asset to the king (*A.L. Irel.*, iii. 469; *Acts Parl. Scotl.*, i. 636; *Reg. Maj.*, c. 26); he is the king's sumpter (*A.L.W.*, Anom. ix. xix. 4); the king shares his thief with no one.

In consequence it was illegal to kill a thief secretly; the kinsmen may appeal anyone who does it; "of everilk theyff throu al Scotland quhether that he be bondman or freeman the weregild is 34 ky and a half" (*Assise of Wm. the Lion*, c. 7).

But the act being an unsocial one, the community need not wait for the kinsmen to take

action; a sheriff may accuse a man of common theft without a prosecutor (*Acts Parl. Scotl.*, i. 652), and the accused, if he cannot find pledges, may be treated as a proved thief (*Assise of Wm. the Lion*, c. 6).

If the oath failed, the thief had to pay £7, or be outlawed or enslaved and work it out—an excellent system where it can be carried out. As a slave he was a valuable asset, and he could be sold for theft to the value of 4d. found on him.

The means of meeting the charge, where execution did not take place on the spot, was by compurgation, with a specified number of men according to the value of the thing stolen (*A.L.W.*, Ven. III. ii. 13; *Assize of King David*, c. 12; *Acts Parl. Sc.*, i.[1]).

[1] By this last a man appealed of theft may choose battle or "tak purgacion of xii leil men with clengyng of a hyrdman." Query, with additional purgation by the oath of a member of the hirs or chief's bodyguard. This is the Norse use of the word hyrdman. The January head court of the Orkneys was called the Herdmanstein.

CHAPTER III

UNWRITTEN CUSTOM AND ARCHAIC LAW (*continued*)

It is obvious that such a system can operate generally so long only as all the members of the community are possessed of an interest in the soil. As the society becomes more unwieldy, more subject to the incursions of strangers who had no rights in the common land out of which they could make payment, as society ceases to have any basis of social unity or becomes, as we express it, more civilised, money payments for crimes and offences against statute law—fines, as they are now called—become only mischievous, being kept alive simply to bring money to those in power, and either remain as an evil or give way to savage physical torture.

The Eric and the Wite.—Such payments, called in Irish history the eric, were of two parts—the compensation or body price to the person or kindred for the actual material loss or wrong, and the honour price, an additional personal sum, varying in value according to the rank of the person injured, called by local names in the different parts, such as bot, galanas, wergild, saraad, etc. etc. Skene (*Celtic*

Scotl., vol. iii.) divides these as eric (galanas) for person slain, dire (dirwy) for injury to property, and smacht (saraad) for injury to person. There would appear to be some confusion over the use of these terms, and I prefer to use the phrases "body price" and "honour price" to cover all. (See D'Arbois de Jubainville, *La Famille Celtique*, chap. viii.)

There was also a commission (the wite, etc.) payable to the chief or to the king of the tribe for disturbance of his peace, for his services as arbitrator, and for his assistance in collection. This eventually, in the hands of the federal kings of England and Ireland, ate out all other payments, and became our modern fines and costs.

The laws of the Brets and Scots, for instance (*Acts Parl. Sc.*, vol i.), set out the payments to be made according to the rank of the injured, and provide for a fine to the king of nine times twenty ky for killing in the peace of the king, with proportionate sums for the peace of lesser men.[1]

A very large part of the different collections of customary law which have come down to us is taken up with the computation of these payments and with the circumstances attending their collection and the adjustment of disputes.

In all parts of the islands the codes of so-

[1] A similar system of compensation may be found in the Salic and Ripuarian laws, and in fact in the customs of any primitive European society.

called laws lay down these customary payments with the utmost minuteness for injuries of every description to all parts of the person, to animals, and to inanimate things, the amount to be regulated according to the rank of the injured; and they calculate minutely the shares in which the kindred of the injured and of the aggressor shall take and pay the compensation (see for example *L.H.P.*, 64, 69, 70, 74, 76, 77, Thorpe; *A.L.W.*, Ven. III. 12; *A.L. Irel.*, iii. 349–381, iv. 241 *et seq.*).

The Equitable Settlement by the Brehon.—Such a system looked to a final settlement of conflicting claims of both parties (*A.L. Irel.*, iii. 99); it was a balance of profit and loss; set-off was of the essence of it; the arbitrator would take into account all irregularities or acts of violence in procedure. The technicalities which accompanied all efforts to compound violence leave us here, in very strong contrast to the course which the English common law, as disclosed by the Pleas of the Crown, by Bracton and the Year Books, takes in disputes.

The computation is often matter of extreme intricacy, according to the dignity of the parties and the circumstances of the act, giving scope to the skill of the Brehon. The chief could choose whether his honour price should be calculated from his position by birth, if he were a chief of high family, whose honour by descent was great, or by wealth, if for any reason his honour price from wealth would be

greater. This matter of honour price was one which needed the nicest care in adjustment, for it was the measure of the power of the offended person or family to take a violent revenge. If he were not likely to get much by violence, his honour price would, in the first instance, be small in proportion.

The chief's status in society depended upon this estimate. The Senchus Mor (*A.L. Irel.*, i. 43) claims to have established a grading of chieftains for honour price for the first time, according to the number of their mortgagors of stock, the amount of stock given by the chief to the unfree stock-borrower being proportionate to the honour price of the chief who gave it.

On this method of satisfaction of social disturbance of whatever character rests the communal system. The party to the quarrel, the plaintiff or the defendant in the first instance, shoulders his own liabilities. First his movable property is liable, then his immovable property, then himself personally (*A.L. Irel.*, iii. 119). As his movable property would be his cattle, without which he could not use the land, it meant in most cases that, if left to himself, his property would be exhausted by such payments, so that he would be wholly or partially enslaved whether it was contract or tort (see *Serbia by the Serbians*, edited by A. Stead, pp. 187–90).

Family Responsibility.—But whether this happened rested with the family in its wider sense. It is essential to realise that in such

cases the kinsfolk of the man, even to remote relationship, were concerned. In proportion as the freemen of the community had a beneficial interest in the common property, they had a resulting common responsibility for payments for the illegal or evil acts or for the breaches of contract of those members of their family with whom they shared beneficially as kin. These would be in the first instance the members of the household of the wrongdoer and the injured or deceased, his father as head of the family if he were still a member of his father's household, then his brothers and remoter kindred. Beyond this, having accepted the principle, it is not necessary to speculate.

The group family was the unit both of the responsibility for action and of the corresponding gain by succession. Everywhere the proportions were settled according to fixed rule in the ratio of the right to inheritance, the paternal relations generally paying or taking double the amount due to the maternal (*A.L.W.*, Ven. III. i. 12; *L.H.P.*, c. 75, sects. 8–10). As an example, the payment of 63 pence for murder would be shared among collaterals by the Welsh laws (*A.L.W.*, Anom. IV. iii. 2 *et seq.*) as follows: 1st cousin, 32d.; 2nd cousin, 16d.; 3rd cousin, 8d.; 4th cousin, 4d.; 5th cousin, 2d.; 6th cousin, 1d.; and they would be liable to pay in the same ratio. (See *A.L. Irel.*, IV. 243 *et seq.*)

After marriage, by Welsh law (*A.L.W.*,

Ven. II. i. 8), the payments for a woman's acts were made by her husband, as she had passed into his family; by English custom (*L.H.P.*, c. 70, sects. 12, 13, 23) by her kinsmen, showing that they had still an interest in her property.

If the wrong-doer could not be found, the family conjointly pay to the king and to the owner of the land on which a killing was done (*A.L. Irel.*, iii. 119).

It might not be unprofitable for the family to pay for a breach of contract or wrong-doing and in compensation take over the wrong-doer's property, enjoying the pasture, the corn, the cattle, and the profits, especially if the wrong-doer had run away, which, if one may trust conclusions drawn from such records as the Orkney Sagas and the Eyres, was most frequently the case.

The Boycott and Outlawry.—As the community were liable for the payments of a fellow-member, they could proclaim a worthless man or fugitive, warning people against contracting with him; in this case they were not liable for him, but could seize the property of any person who contracted with him (*A.L. Irel.*, ii. 281).

If they had not proclaimed him, if the wrong-doer refused to pay the amount due, the community who were liable would pay it and recover it from his property or outlaw him if he fled. When outlawed they might by fixed payments deposited in the hands of the chief and other parties insure themselves against

his subsequent acts. Then they are exempt, until by some act of friendship they show sympathy or approval: "until one of them gives him the use of a knife or a handful of grain, or until he unyokes his horses in the land of a kinsman out of family friendship" (*A.L. Irel.*, iii. 383). Or they might avoid payment by handing him over to the creditor. Then if the king did not settle him on the waste as a fuidhir tenant, he might be killed with impunity.[1]

Another and a very important aspect of these payments was that the refusal to a man by the community of the payment for value due to him for injury in consequence of an act, acted as outlawry or as a threat of outlawry in the event of his committing further unsocial acts, or neglecting or refusing to perform his communal duties. The man whose honour price had been diminished or taken from him would have less remedy or none for an injury from any member of the community. Except for distraint of cattle this was practically the only remedy for neglect of military duty; it was a reminder to the unjust judge. Honour price may be refused, says the Senchus Mor (*A.L. Irel.*, i. 25, 55) to persons committing crimes, or to Brehons who pass false judgments. Every person, says the Corus Bescna (*ibid.*, iii. 27) who does not fulfil the law of his service shall not have full dire fine.

[1] This is what I understand by the passage on p. 383 of *A.L. Irel.*, iii., beginning, "Is ann is comraiti . . ."

So long as the communal system had any influence on legal proceedings, the liability of the kinsfolk either wholly or partially remains. Henry II. in the course of his quarrel with Becket, writing to the sheriffs in 1164, orders them to seize into their hands all the revenues and possessions of the Archbishop of Canterbury; also to arrest the fathers and mothers, brothers and sisters, nephews and nieces of all the clerks who were with the archbishop, and to put them and their chattels in safe pledge (*King's Letters*, No. 5, from "King's Classics," edited by Prof. Gollancz, More Press, 1903). In 1552 Mary of Guise, Queen Regent, and in 1561 Mary Queen of Scotland ordered that offenders in the border squabbles should surrender their nearest kinsfolk as surety for their good behaviour.

The Good Offices of the Chief.—The payment on a settlement to the chief as arbitrator and as tax collector brings us one step nearer to the judge and the law court. It introduces us to the first elements of kingly authority and to the first shadow of communal taxation. All judicial authority first arises from the chief's regulation of the fight or from his arbitration in place of the battle.

The oldest form of all regulated satisfaction of tort or ill blood, the earliest interference in the right of unlimited war met with in history, is that in use now in international matters in Europe—war, the appeal to battle, the trial

by battle, the superintendence of the fight by the chief.

Every old collection of custom contains provisions regulating this privilege of settling criminal or civil matters by the sword, as a privilege of the freeman. *A.L. Irel.*, iii. 239, appears to contemplate a trial by battle under form of law, such as is described in Egils Saga, with a definite legal time in which it must be concluded. *Ibid.*, v. 477, "To proclaim a combat without offering to submit to law" rendered liable to a fine. *Ibid.*, i. 195, 199 regulates the stay on a distress for a man who has lost the combat (in an external territory, says the commentator). Beaumanoir in ch. lix., "Guerre par nostre Coustume," set out the conditions under which and the persons by whom the combat may be waged, "ne pot queir entre gens de poeste ne entre borgois." This was towards the end of the thirteenth century. The custom of Alais in Southern France allows acts of violence of all kinds, setting fire to houses and so forth, to be settled by battle or by ordeal of fire or water. The person charged, if vanquished, leaves his body and goods at the mercy of his lord, which means a heavy fine; the appellant, if vanquished, only pays 100 sous. In the Burton Chartulary (*Staff. Coll.*, v. 82) a dispute between the Abbot of Burton and his tenants, in which he beat them by *force majeure*, is recorded. *L.H.P.*, ch. lxx., sect. 9, and *T.A.C.N.*, c. 31, contain similar provisions.

The chief and the chief men saw that the fight was fair, and undoubtedly used influence that it should not be fought *à outrance*, but only in a fixed place, within definite limits, and under equal conditions. The cessation of the fight on the king throwing down his staff in the tournament is a survival.

But beyond his superintendence of the fight the mediæval chief is up to late times a friendly arbitrator who offers his services to bring about a friendly settlement instead of a fight, just as at the present day our tribal or party government steps in to suggest terms of agreement between masters and men in labour disputes.

The chief had sometimes to use a good deal of patience and tact before he could bring the parties into a mind to settle their affairs of blood peaceably. John wished (says the O.S., p. 102) that men should be sent to seek an atonement, but Solmund and Hallward, Harard's brother, would hear of nothing but revenge, man for man. Later (p. 106) we are told: "After that the king sent word to both sides and summoned them to him. Then they came to the king with their kinsfolk and friends; then an atonement was sought, and the end of it was that the king's doom should pass upon all their quarrels, and either side plighted their troth to the other."

If the offender had no property, or had in the past been such a nuisance to society that his kinsfolk would not trust or answer for him, the chief, with the consent of the community,

could, to avoid the blood feud which was otherwise inevitable, outlaw him, leaving it to the wronged parties to pursue, or to kill him if he came back and they felt themselves strong enough. When the prodigal returned, often only with the tacit consent of the community, time and the necessity of not multiplying dangerous enemies might and often did bring about a compromise or reconciliation.

One of three things was always assumed: either the family of the injured person will require blood, leaving to posterity an unhealed feud, unhealable except by marriage and money payment; or the offender will be driven out of the community altogether; or the kindred[1] will accept a money payment according to a recognised customary tariff which the king or chief on application enforces as arbiter, and for which he or his judge takes fees. Undoubtedly the fees for settling such matters were a very valuable part of his revenue, apart from any interest which he might have in his own special criminals. In a time when the king was in the first place responsible for all items of administration, and had no revenue except odds and ends of farm products with which to meet expenses, any jurisdiction over torts between families which he could draw to himself was very welcome. In the enumera-

[1] According to the Dimetian code of the Welsh laws, the liability of the kindred for payment extended as far as sixth cousins. (Dim. II. i. 17–31 and xxiv. 12; III. iii. 4; Anom. IV. iii. 11.)

tion of the king's perquisites these sources of value are always specified.

But apart from this arbitration of the chief, which would not appear to have been compulsory, there is, with the exception given below (p. 53), no procedure mentioned for trying any issue of guilt or responsibility, except a denial on oath of the offender and his kinsmen, and no criminal court as such. As every murder was the possible opening for a local war of large dimensions occurring very likely at a time when the king or overlord wanted all his force for outside operations, every feud leaving behind it a bitter enmity which might revive untimely in the day of wanted co-operation, it was in the interest of the chief, not only financially but also politically, to bring about a settlement if it were possible. The knowledge of this fact made him and his most influential advisers anxious and ready to settle blood feuds.

He could proceed against the offender if he considered that the feud affected his own peace or authority, but he need not do so. He might leave the whole matter to the kin of the injured party, or he might wait to interfere until he was asked by them for his good offices for arbitration.

An instructive summary of the good offices of the chief is provided in the *T.A.C.N.* The offender must first settle with the kin of the injured before the chief can take the matter up. In certain cases of unsocial crime which

touched society such as theft, secret killing (murdrum), and burning by night, no composition could be made and no peace granted.[1]

In any event the chief must have his fees. Section 4 provides that if the homicide have the peace of the friends of the slain he must also have the peace of the duke.

The Kinsman's Right of Vengeance.—But the offender must first settle with the kin of the injured before the chief can take the matter up.[2]

By c. 89, the outlaw can only be reinstated by the will of the king. But the form of the writ is, "e por ce nos vos mandons que il oit nostre pes en nostre terre, si que il face pes o les amis al mort, que nos n'en oions clameur"; that is to say, the writs were only of value so long as the friends of the dead would let the accused alone. The king or duke did not pretend to interfere with the right of private vengeance.

A good illustration of the procedure under such customary law is a case reported in *S.P.C.*, p. 21, Northampton, 1202. The county is called on to show why they have outlawed a man twice for a killing. They explain that

[1] *T.A.C.N.*, ch. 36, sect. 2: "De larrecins, de murtre, de traison, d'arson de maison par nuit, de roberie ne puet nule pes estre fete o ceus qui eu sont convaincu; mes se il soit pris, il soient pendu, ne li dus, ne sa justice n'eu praigne deniers."

[2] c. 36, sect. 1: "Des Pes Fuitis: Li dus ne puet fere d'omecide envers celui qui l'a fet, se il n'est avant reconciliez as amis celi qu'il ocist."

after he was outlawed he hid for a long time. Then he produced letters from the justiciar showing a pardon from the king, and an order to the justiciar "that we be aiding the said Hugh in re-establishing the peace between him and the kinsfolk of the slain," which he passes to the county. The letter is read in full county court, and Hugh is told that he must find pledges that he would be in the king's peace. Whereupon Hugh disappears (being unable, most likely, to find pledges). The kinsfolk of the slain becoming restive, the county put them off from time to time in the hope that Hugh will turn up. But he doesn't, and so at a later county court the county said that "as Hugh would not appear to the king's peace, he must bear the wolf's head as he had done before." To judgment against the coroners and the twelve jurors.

The treatment of the feud so indicated in the *T.A.C.N.* can be illustrated from all parts of the islands.

In the laws of Wales (*A.L.W.*, Anom. IX. xx. 49) it is laid down that a lord cannot prosecute for murder without an accuser, who must be a relative so near of kin as to be liable to pay the blood compensation.

The settlements in the Orkneys and Shetlands between any parties are made "saving the king's right and that of the next-of-kin to take the feud up" (O.S., p. 101).

Even when the Angevin kings have issued a system in which it is to their pecuniary

interest to try for crime, the right of vengeance of the kinsfolk is preserved. A man prosecutes an appeal against another for the death of his father. Answer that he was not nearest in blood. The justice says that the furthest off in blood can prosecute an appeal in default of one nearer. Second exception that defendant had been arraigned for this by justices assigned to deliver the gaol, had put himself upon the country, and had been acquitted. Appellor answers to this that the arraignment was at the king's suit, and that that deprives no one of his suit (*i.e.* no one naturally entitled to prosecute the appeal). (Y.B. 32 Edw. I., p. 192.)

There are frequent cases in the English Pleas of the Crown which show that even when a case has been tried and the offender has suffered the ordeal, he was liable to be attacked by the kinsfolk of the injured. For example, *S.P.C.*, 1212, Suffolk: Willie Brown, who has succeeded in the ordeal of water, which means abjuring the realm, offers the king a mark to be suffered to return and find pledges in case anyone wishes to accuse him. In *A.L. Irel.*, iv. 255, the Brehon considers the case where damages for a killing had been paid, or law had been offered, but some members of the family had already taken vengeance.

I do not think that it is possible to appreciate thoroughly the position held by ancient society with regard to what we call crime, without a sympathetic study of Num. xxxv.

and Deut. xix., on which they based to a great extent their ideas. (See, for instance Deut. xix. 4-6.)

The Icelandic Community.—There is one striking exception to this simplicity of early communal criminal procedure — that is, the elaborate litigation in Iceland which is depicted for us in the Icelandic Sagas.

The origin of the Icelandic community, the settlement by men of the chieftain class who, defying approaching feudalism, carried their households and their goods to a far country and occupied large tracts of land by separate families, may account for the very modern and very elaborate procedure in the Law Things of the island, whether we take the account from the Landnamaboc and like records or from the Sagas.

They acknowledged no earl who could be their arbitrator; themselves for the most part men of the better class, accustomed to think, act, and command, they create, where they interfere at all to check disorder or to influence and control the right of private vengeance, a procedure which can rival Rome for technicality and completeness.

No doubt the necessities of commerce help to account largely for this uncannily modern spirit of litigiousness, so fully developed while the Saxon was still in the most primitive stage of registering wer and wite.

But the origin of the settlement itself accounts for the advance. The Icelandic

community was a pure mediæval democracy, in which all that was best in it felt a responsibility for the common safety, and tried, at a stage of human progress in which self-defence was the first necessity, to formulate methods of law trial which might give pause to hot blood. It is what all good law is—arbitration by a native aristocracy, who seek by patience and well-thought-out modes of working, by laying down principles acceptable to the sense of fairness of the whole community, to draw an unruly society from methods of violence to the knowledge that peaceful settlement of disputes at the instance of impartial neighbours is a service to the State which is perfect freedom.

The procedure is of course highly technical—perfection only slowly comes in any science with simplicity, whether it is law or music; but the difference between the law courts of Iceland and the law courts of Rome and England in the twelfth century is that the chiefs who act as mediators not only get no profit from their efforts, but often run great risks in the course of their endeavours for peace. It is, I believe, from such a condition in a remote past that the English bar of to-day draws its high pre-eminence. A barrister cannot sue for his fees.

As an example of the Icelandic procedure, in the Nial's Saga, ch. 56, the plaintiff first proves the notice given of the suit. He then calls on the neighbours who have been named

to form the inquest to be seated, and on the defendant to challenge them. He then invites the inquest to utter their finding, which they do, with the exception of one case in which the next-of-kin, as they were in Norway, could not appear to prosecute.

Hereupon the defendant upsets the whole case of the plaintiff, making declaration that the man who had been killed had been outlawed; and he further pleads that the plaintiff was guilty of outlawry for calling on men at the inquest to deal with the case in which the next-of-kin, who only could prosecute, were in Norway.

In ch. 73 the defence calls on the jury to answer whether the men attached for the killing had gone out with that mind to the place of meeting to do the defendant mischief if they could, to which the inquest answer Yes. (And see chapters 120-122.)

CHAPTER IV

EXAMPLES OF CUSTOMARY COMPENSATION

THE communal conditions may be best appreciated by means of a few illustrations of some of the happenings under the system of satisfying wrong just described in the islands at and after the middle of the twelfth century.

The Orkneys and Norway.—The Orkneys give us some very interesting examples. Here in a small seafaring community, in a very small area of land incapable of increase, the centre of government was the hereditary earl, in the first instance appointed by the king of Norway, and nominally subject to his authority. To him alone, without any Brehon lagman or assessor, any effort to compromise the frequent blood feuds appears to have been referred.

The Orkney and Shetland Records (*Antiq. of Shetland*, G. Goudie: Blackwood, 1914. *Records of the Earldom of Orkney*, J. Storer Clouston: Constable, 1914. *Orkney and Shetland Records*, A. W. Johnston: Viking Society, 1914) give us an insight into the legal procedure in civil cases only—procedure almost entirely relating to the transfer of land, which appears to be definitely settled by Norwegian law. There is no suggestion, either in these

records or in the O.S., of any trial, even at the frequent Things called by the earls, of any case of what we should now call crime. When it was awkward that a feud should continue, prominent neighbours came and talked to the earl, who sent for the parties and tried to bring about a settlement (see O.S., 77, 86, 134–51, 187). Counselling forgiveness of Sweyn, Asleif's son, and his abettors by the earl for a particularly brutal murder, the wise woman says it has always been the custom of the noblest men to do much for the sake of their friends, and so to gather to themselves force and friendship (O.S., 120).

One of the most instructive examples of all comes through Norway. It shows that besides a blood payment to the kin, the king or earl had to be "squared," and that no friend could make a settlement without the consent of those entitled by relationship.[1]

Cecilia, the sister of Saint Magnus, earl of the Orkneys, marries a Norwegian. In 1127 a murder arising out of a blood feud occurs in Norway (O.S., pp. 96, 101, 106). The slayer offers Cecilia's son Kali, who was a friend of the murdered man, that he, Kali, should make the award for the murder, "saving the king's right, and that of the next-of-kin to take the feud up." This offer falling through, in a final settlement of the quarrel by the king Sigurd

[1] "Se li homicides puet aquerre la pes as amis a cels que il a ocis, ce ne vaut riens se il n'a la pes le duc" (*T.A.C.N.*, c. 36, sect. 4).

he gives Kali half the Orkneys and the title of earl. He becomes Earl Rognwald. "It was so fixed in that settlement that John Peter's son [one of the parties] should take Ingirid, Kol's [the other party] daughter, to wife, and then friendship would spring up with those ties, while the manslaughters were to be set off one against the other. The attack on Kol and John's wound were set off against the loss of men away there east, but the wounds on either side were matched together and set off, and those that were odd were atoned for in money." "After this atonement they parted with great love tokens."

The money compensation was not merely an instrument for overlooking a first offence. The same man, if he can make himself sufficiently dangerous, pays again and again for violence and murder. The Earl Rognwald above mentioned, about the time of the accession of Henry II., was engaged in making peace between Sweyn, Asleif's son, the viking, and Earl Harold, Rognwald's foster-son, with whom he shared the Orkneys (O.S., 203). The settlement apparently succeeds; but in a short time Sweyn tries to burn Harold, and then flies. He is, like the earl of Mercia who held the balance between Ethelred II. and the Danes, too powerful a person to have as a permanent enemy. Earl Rognwald meets him again and brings him and Earl Harold together. But neither will trust the other. "Sweyn fared south into the dales [the west

coast of Scotland, including Argyllshire and the coast to Caithness], and was that Easter [1155] with Summerled and his friends."

Earl Rognwald was not discouraged. After a while Sweyn came back and came to him, and he again made up some sort of a peace between Sweyn and Earl Harold.

We must not suppose for a moment that the Orkneys or Shetlands were uncivilised communities. As great trading centres they were in the van of progress at that time. They were in no respect different from their Scottish neighbours or from their English ones, except that the monastic fiction-writer threw a glamour of what is called chivalry over the more southern murders.

The Scottish king had no qualms about utilising outlawed Orkneyingers (see O.S., 185–94). In 1139–48, Sweyn, who was then Earl Rognwald's bailiff in Caithness, fortifies himself and his men in a stronghold against the earl. Besieged, he and his deputy are let down by ropes into the sea, join with the other Orkneymen in a ship of burden, sail to the Isle of May, where they rob the monastery, and in the end come to King David in Edinburgh. He receives them gladly, and pays for their robberies with his own cash. At Sweyn's request he gets atonement for him from Earl Rognwald, and Sweyn returns north (O.S., 147).

Just before Henry's accession Earl Erlend and the same Sweyn went on a viking cruise on

the east coast of Scotland. At North Berwick (lat. 56·5 and long. 3·15), fairly close to the Scots king's residence, they rob a merchant's ship and carry off the goods and his wife, who was on board. The merchant bargained with the men of Berwick (most of them chapmen) to pursue the thieves, which they do in fourteen ships (O.S., 191–2). But Sweyn fled to Malcolm the Maiden, who sent men with bags of money to pay for the robbery, and gave Sweyn costly gifts.

In 1156–7, Thorbiorn clerk, who was Earl Harold's chief counsellor, had been outlawed by Earl Rognwald for divers murders. He went south to Malcolm, who gladly received him. Gilli Odran, outlawed by Malcolm, ran off to the Orkneys, and was taken into the earl's service as steward of Caithness, where he might best annoy the Scottish king. But he promptly committed a murder and sailed away to the west, "to Scotland's firths, and that chief took him in whose name was Summerled the freeman. He had rule in the dales, in Scotland's firths." Summerled had married the daughter of Olaf, king of Man (O.S., 212–13).

Not even the close ties of fosterage could obliterate the desire to replace a killing in return by the blood fine. Earl Rognwald, while deer-hunting with Earl Harold his foster-son in Caithness, is murdered by Thorbiorn clerk. Earl Harold wishes to give Thorbiorn "peace" for the murder of his foster-father,

and urges it to the chiefs. He would have done so but for the chiefs who were with him, who insist on slaying the murderer on the spot (O.S., 215).

A knowledge of these conditions will enable the reader better to understand the position of William the Lion, the contemporary of Henry II., Richard, and John, the strongest and most aggressive of all early Scots kings, a king depreciated by Scottish history-writers, who follow the monastic Anglo-Roman view of Scotland as an annex of continental England. William's position was one of perpetual *divide et impera*. The Scots kings were always liable to be stabbed in the back from the Orkneys or Western Isles.

Just one more example, this time from Iceland (Nial's Saga, ch. 56). The award was that Skamkell should be unatoned. The blood money for Otkell's death was to be set off against the hurt Gunnar got from the spur; and as to the rest of the manslaughters, they were paid for after the worth of the men, and Gunnar's kinsmen gave money so that all the fines might be paid up at the Thing.

Examples of Tort in Ireland.—In Ireland, although there was a central authority for the whole island in the Ardri, he does not seem ever to have attempted interference in the matter of the blood compensation, which was no affair of State but purely a matter for the kinsfolk to move in.

As an illustration from the Four Masters. In

1177, Niall O'Gormly, lord of the men of Magh Ithe and Kinel Enda, was slain by Donough O'Carellan and the Clandermot in the middle of Derry Columbkille (Londonderry). The house in which he was was first set on fire, and afterwards, as he was endeavouring to escape out of it, he was killed in the doorway of the house. Donough O'Carellan then made his perfect peace with God, St Columbkille, and the family (*i.e.* the clergy) of Derry for himself and his descendants, and confirmed his own gifts and those of his sons, grandsons, and descendants for ever to St Columbkille and the family of Derry. He gave them a ballybetagh of land (about 480 acres out of territory seized from O'Gormly), and delivered up to them the most valuable goblet at that time in Ireland as a pledge for sixty cows. There was also a house erected for the cleric, and reparation was made by him for all damage caused by the burning. All the Clandermot gave likewise full satisfaction on their own behalf. The Church clearly lost nothing material by the continuance of the system.

This is from Ulster. Another example is of a blood feud in Connaught in the year 1244 (Annals of Loch Cé). The names are simplified—O'Reilly for O'Raighilligh, Teige O'Conor for Tadhg O'Conchobhair, etc.

"A very great hosting by Felim, the son of Cathal Crovderg (the then king of Connaught) eastwards into Brefny to O'Reilly, to inflict punishment on him for his foster-son and

kinsman (he was the son of his brother Hugh O'Conor) Teige O'Conor, when they encamped for a night in Fenagh-Moy-Rein. And there was no roof on the church of Fenagh at that time; and the comarb (the abbot) was not in the place that night: and as he was not, the routs of the army burned the booths and huts that were inside the church without the permission of the chieftains; and the comarb's spiritual foster-son (Dalta Dé, God's foster-son; according to the annals of Connaught, a foundling adopted by the abbot) was suffocated there. And the comarb himself came to them on the morrow, in great fury and rage, on account of his foster-son, and demanded the eric (the blood fine) of his foster-son from O'Conor. And O'Conor said that he would give him his own award. 'My award,' said the comarb, 'is that the best man amongst you shall be burned by you as the eric of the Son of God.' 'Magnus, son of Murtagh Muimhnech, is he,' answered O'Conor. 'No, truly,' said Magnus, 'but the person who is chief over the army' (*i.e.* O'Conor himself). 'I shall not leave you,' said the comarb, 'until the eric of my foster-son will have been obtained from you.' The host went afterwards out of the town, and the comarb followed them to Ath-na-Cuivre on the Geirctech (yellow river); and the flood was over its banks, and they did not pass over it until they pulled down the hospital house of John the Baptist which was on the margin of

the ford, to place it across the river, that the host might pass over it. Magnus . . . and O'Conor . . . went into the house, when Magnus, pointing up his sword, said to the man who was overhead throwing down the house, 'There is the nail which prevents the beam from falling.' At these words the rafter of the house fell on the head of Magnus . . . and fractured his skull so that he died on the spot (where was the comarb? on the roof?); and he was interred outside the door of the church of Fenagh; and thrice the full of Clog-na-righ[1] of silver was given as an offering for him, and thirty horses; and thus it was that the comarb of Caillin ultimately obtained the eric of his spiritual foster-son from them."

The Restricted Authority of the King.—To recapitulate once more, then. Under the communal system torts and accidents, such as killing, whether deliberate, accidental, or in self-defence (for in this respect there was little distinction), rape, arson, and theft, equally with trespass and breach of contract, were met (unless the offender suffered summary death at the hands of the injured) by outlawry, or by compensation in money or goods by the offender and his kinsfolk to the injured if living, or if dead to the kinsfolk of the injured who would have been liable if he had been the offender, according to a regular scale of charges and a regular scheme of dis-

[1] A goblet or font belonging to the abbey.

tribution, in which the chief acted as agent of arbitration.

We have now to put by the side of these archaic methods of satisfaction, which recognised no moral principle and acknowledged no sin in the acts committed, some results of the claim of the king on behalf of the State to punish the more serious offences as crimes by State courts duly constituted.

Here we come for the most part to England.

The courts of the Orkneys and Shetland, as the remote colonies of Norway fell under the influence of south-eastern Scotland, adopt the procedure of the people with whom they are eventually to be incorporated, and fall into line with their methods of administering and enforcing the law.

After the English invasion of Ireland, as the years went on, the Justiciar's Court, the supreme law court for Ireland, reviewing the Bench, Exchequer, Justices in Eyre, Courts of Liberties, County Courts, and Hundred Courts of towns, replaces, for the English and Welsh of the Pale alone, the Brehon law by the English common law and the statutes published for use in Ireland. It was centuries before this began to be accomplished, and it was effected only by delegations of jurisdiction which ignored the federal authority.

CHAPTER V

THE COMMUNAL LEGAL PROCEDURE

BEFORE we pass to the change which resulted in the predominance of the English common law, a few words must be said on the legal procedure of the communal societies.

No Courts of Record.—It was not that in the earlier communal society the kings and the lesser chiefs did not have their own courts in which all matters which affected them as heads of the community could be disposed of. But so long as compensation according to a customary tariff was the recognised remedy for all communal disputes or wrongs, there was no necessity for any reduction to writing of the proceedings in the arbitration. Counter-claim and set-off being admitted, and the measure of damages being the only or chief point to be settled, there was no sign in the other parts of the islands of any such procedure of federal courts as was transforming England and south-eastern Scotland in the latter half of the twelfth century.

Any meetings of notables called by the kings or chiefs were not courts of record, and we have no reason to believe that they ever did more than verbally register customary law.

Outside the matters which personally appertained to the chief and affected his peace, society recognised a state of private war which covered as between man and man much that we now call crime. As between nation and nation we still acknowledge war as an excuse for murder, rape, and open robbery and many other criminal acts, payable by indemnities from the losing side—wars of which we shall never be rid until we treat the perpetrator as we now treat the criminal responsible for acts between man and man. In the same way, then, the king or lord only concerned himself with those offences which were likely to disturb the general peace of the community, involving him and those to whom he had 'given his peace'—that is, guaranteed his protection—in a general war. Even up to the middle of the twelfth century customs and jurisdiction are distinguished even in England for the three natural divisions of the Danelaw, Mercia, and Wessex. (Laws of William the Conqueror, ii., iii., viii., xvi., xxi., etc.; *L.H.P.*, vi. (Thorpe).)

The Irish or Manx Brehon and his unwritten legal system was no more peculiar to the Celt than the lawman to the Scandinavian or the sheriff of the county court to the Saxon.

The Scandinavian wars of the tenth to the eleventh centuries cannot be understood at all unless the inquirer gets rid of the idea that defeat was due to the 'wickedness' or 'weakness' of the overlord. Unless his 'peace' was

affected, he was not in the first instance concerned at all; while the local chief was not only responsible for quelling violence and settling quarrels, but was exceedingly jealous of any interference in his privilege of doing so, as he took fees for the settlement (see *First Twelve Centuries of British Story*, pp. 66, 67, etc.).

The confusion in this period of history has come about solely from the story being told by Benedictine monks, who magnified the helpless overlord into a Roman emperor who was successful if he obeyed the precepts of the Church; while the local chief became in their hands a feudal earl owing fealty to the emperor—an earl who very frequently from inherent wickedness refused to recognise the, in theory, far-reaching and, if he obeyed the Church, beneficial authority of the emperor. Hence the absurd story of Ethelred II. and others in the hands of Mr Freeman.

So vastly important was this right of local jurisdiction, that the gradual seizure into the hands of the Crown of the profits of adjudging penalties for crime plays a great part in the repeated insurrections of the barons against Henry and John.

At John's accession the barons offer to swear fealty to him if he will secure to them "sua jura," and their anxiety for the right of local tyranny in this respect unhindered by the Crown has a great deal to do with their opposition to John.

On the other hand, the prerogative of mercy

which dropped as the gentle dew from heaven upon the needy king, especially blessing him who takes, was a very important one; it was an especial prerogative of the Crown, which watched jealously any attempts at encroachment on this special province by the exempted courts.

In drawing conclusions from our records of Pleas of the Crown as to the extent of the powers of the courts both of king and county, one must remember that there were very large exceptions to the king's jurisdiction, both from the sale of the hundred courts to manorial lords, and from the many grants of exemption from jurisdiction called franchises, which in days when the king's arms did not reach so far were a source of considerable revenue to the king. Very many of those who come before the justices are in the main-past of some baron or abbey. There was a wide exemption of boroughs from king and county jurisdiction.

As an example:—Cantred of Offaly, city of Kildare: Robert Percival claims to have liberty to make judgment of Englishmen, and to hold Englishmen in prison for a year and a day.

The burgesses of Kildare claim to have correction of all trespasses done within the bounds of the burgh, except the four principal pleas, and except robbery and other felonies and breach of the assize of wine, by charter of the lords of the liberty.

John, son of Thomas Peter de Bermingeham, and all others who hold courts in their county, claim to hold plea of *vetitum namium*, and bloodshed of Englishmen, and to take fines from Irishmen, except felonies, etc. (Calendar of Justiciary Rolls of Ireland, 1297–1305. See *S.P.C.*, pp. 39, 123; *Som. Pl.*, 149, 164, 394, v. 999). In 1182 the monks of Arbroath obtain a papal bull confirmatory of the rights granted them by William the Lion. They are to be free from all tolls of merchandise, to have free court with sac and soc, thol and them and infangthef, the ordeal of water, hot iron and combat, and pit and gallows (Innes, *Scottish Legal Antiquities*). By the Assize of King David, c. 13, barons who have gallows and pit may not make concord without leave of the king. By the laws of Alexander II., c. 2 (Skene, *Regiam Majestatem*), there is provision for an inquisition by the justiciar of Lothian about the malefactors of the country except in Galloway, "quha hes their owne speciall and proper Lawes." See Vinogradoff, *English Society in the Eleventh Century*, chapter on "Franchises."

The General Assembly.—Another influence told against a federal legal jurisdiction. Wherever the system of common land ownership is found, there is also found a disinclination to acknowledge any customary law imposed from without the community. The tribe not only declares its own local customs in its own local assembly, or folk-moot, but enforces them

by means of the pressure of the opinion of the community as expressed by the chief and his assessor the Brehon, the lagman, the communally appointed and eventually hereditary judge-lawyer of the tribe.

We have a very full description in the Nial's Saga of the proceedings in the Thing or Folkmoot, and an example of such proceedings in southern England in the county court held at Pennenden Heath in Kent, soon after the Norman Conquest, to pass on the conflicting rights of Archbishop Lanfranc and Odo of Bayeux.

But such general assembly, at all times very disorderly and very partial, soon falls into disuse for judicial purposes; the king or chief is generally occupied in fighting and other matters of administration; the professional lawyer gradually becomes the independent repository and declarant of the customs, and people tolerate him because he is supposed not to declare new law but to be the repository only of existing custom. The English case law takes its authority from its origin in such local customary law.

The Variety of Procedure.—There was variety, of course, in the older procedure in the different parts of the islands. In the Orkneys we see no sign of any judge beyond the rough arbitration of the earl's court in the O.S., and the later Icelandic procedure in the Things; the various phases of the blood feud being bound up with the authority of

the earl as arbitrator and friendly mentor, and the acquaintance with the tariff of the persons who listened to the Saga being assumed. In the Western Islands we have no records of such matters except as they became a refuge from unsuccessful war in Ireland or the Orkneys, but it may be safely assumed from their history and connection that they followed a Norwegian-Irish tariff.

Here they continued to satisfy torts by compensation under customary law until by act of the Scottish Parliament in 1503 justices for the Isles were appointed to hold courts at Dingwall or Inverness for the North Isles, and at Tarbet and Campbeltown for the South Isles. This led to a three-years war in which the men of the Isles overran Bute, Arran, and Lochaber, and the Scottish king sent both army and fleet against them. The war ended by the capture of Stornoway Castle, with Donald Dubh, the leader of the Islesmen, in 1506.

In Man the deemsters were the depositaries of the unwritten custom, the breast laws, of which Deemster Parr in 1693 made an abstract which never got beyond the MS.; but I believe that no tariff or account of the customary procedure in cases of tort is extant. In Ireland the Brehon, even in the sixteenth century, acted as the agent of arbitration on customs, "repugning both to God's law and man's," insomuch as the king got nothing thereby. But the Irish laws give no detailed

account of the tariff, which apparently would be familiar to the readers.

Where there was a lagman, Brehon, or deemster, he owed his office, even if nominally elective, to the influence of the chief, whose interests he served in settling tribal disputes. If he gave a false judgment or made a mistake he was liable to be mulcted or lost his fee.

The Welsh laws contain ample provision for the payment and distribution of the compensation for tort; in their accounts given of the courts for judging cases relating to land, which show, I think, that the Roman influence was never extinct, there is not only a judge of the lord's court, but a judge of the cymwd (or half-hundred, *A.L.W.*, Anom. iv. iv. 10). It is a commonplace in all these early laws that a common lord is an essential for justice—that is, each had its own community court of arbitration. Speaking of causes "in the court of a cymwd or cantrev," the laws mention "judicial judges by privilege of land like breyrs" (or freemen, *A.L.W.*, Anom. vi. i. 1). But there is nothing whatever to show that any of the courts had any criminal jurisdiction in the sense of having any ability to modify the customary compensation for tort. Yet the Welsh codes, like those of the early Saxon and Norman, deal far more with criminal than civil matters; and where they touch on civil affairs they concern themselves with the primitive relations of man to the land and to cattle

—like the English law, all unconscious of a sense of the equities, of the refinements of contract, of bailment, of contributory negligence, of suretyship, of all those things which make the Brehon laws of Ireland so attractive and so inexplicable to those who study them.

The ancient English and Welsh laws are, in fact, the recorded habits of savage people who eventually will fall under the yoke of the rediscovered law of Rome in the East; while the customary law of the Irish community, reflecting the highest development of a widely different social system complete in itself and of very modern character, is, so to speak, struck sideways by the Roman system as it glances in the hands of the local judge-lawyer, and as it slays the social community the Brehon law becomes deodand (Y.B. 30–31 Edw. I., p. 529). England alone develops a system of federal courts.

The Enforcement of the Decision.—Not only were the communal courts not courts of record, preserving no minutes of their judgments in writing, but, except where the king or earl, for the necessity of preserving the peace or by way of penalty where nothing else would serve, used such violence against an offender as amounted to a state of war—or except, as appears to have been a common practice, the chief paid the compensation himself for his kinsman and trusted to circumstances and his power to get it back with interest,—with these exceptions the court may

be said to have made no attempt to enforce the decision given.

There were two chief methods of procedure to compel compliance with the verdict of the community. One of these—outlawry—rested for its execution with the community itself. The Brehon as the mouthpiece of the court declared the offender deprived of the compensation which would be paid under the customary tariff to him for injury or to his kinsfolk for his death, which meant that he could be robbed, injured, or killed with impunity, or driven out of the community. He stood from that time outside all protection of family amity, relying on his own physical strength alone.

Distress.—The other form of procedure, the universal remedy in every early society of which we have records from China to Ireland, preceded any decision of the Brehon, any form or trial, any cause civil or criminal.

The common sense, the natural greed, of men urged them, on receiving an injury, often to seize the offender's cattle instead of risking the rash medley of a personal combat. The arbitrator chief, who sought a peaceful issue, used the human instinct to formulate a legal procedure by permitting a simulated violence. The seizure of the cattle was allowed if done fairly and according to regular forms; the action was gradually fenced round by a wall of formalism, with the intent and with the effect to compel the offender to submit the

dispute, whether the killing of a man or the trespass of an ox, to the arbitration of the poet-lawyer. If either the man who seized or whose cattle had been seized wished for the assistance of the powerful chief, he must submit the question to his decision and pay him a fee for settling it.[1] We therefore find that all collections of customary law treat in very great detail and with the utmost elaboration of technicality of the customs relating to distress and of replevin, the return of the cattle to the offender on his giving security to come to trial of the issue.

In order to prevent the simulated violence from becoming a reality, all the steps in the procedure were regulated throughout according to highly technical rules. To make sure that the procedure is regular, an advocate, a law agent, a Brehon must assist in taking a lawful distress. Unless he has been a witness of the distress, the conservator of the technical custom cannot speak in court to the exact accuracy of the procedure (*A.L. Irel.*, i. 85; ii. 125). The allowance of any variation might result in the law process turning into a cattle-driving raid or a free fight.

It is the universal remedy in all matters of dispute, of contract as well as of tort, of public duty as of private right. For instance, we

[1] See *A.L. Irel.*, iii. 310–21; *Résumé d'un Cours de Droit Irlandais*, par M. D'Arbois de Jubainville; and *The Early History of Institutions*, by Sir Henry Maine. Who gets the fee for cattle-driving in Ireland now?

find proceedings by distress contemplated for not invoking a blessing on a completed work (*A.L. Ivel.*, i. 125); for disturbing a fair by fighting (*ibid.*, 234); for forcing a man's wife (*ibid.*, 167); for satire, slander (such as calling a man a bastard, by which he might lose his right to the land), betrayal, false evidence, or false witness (159, 187); for trespasses of all sorts and breach of good neighbourhood between land occupiers (163); for communal duties, such as clearing thorns and brambles from the roads at certain times (123), guarding cattle from the crops on their way to the mountains (125), maintaining the aged of the sept; for not going on an expedition when a force is levied by the king (*ibid.*, 230, 152); for not going to the common assembly or not paying the food rents (*ibid.*, 230); or for theft, arson, and secret killing. The Year Books are full of such cases. *E.g.* 33 Edw. I., p. 428, seizure of beasts in default of military service, and for non-attendance at court of manor; *ibid.*, 430, seizure of a bull for trespass and damage; *ibid.*, 432, seizure for money rent; 30–31 Edw. I., p. 64, seizure for neglect to mill at the abbot's mill.

After in most formal manner making his claim, the plaintiff begins his distraint proceedings. But here, before he can proceed to hostile action, he must satisfy a most peculiar obligation which shows us how anxious, in two great civilisations of the ancient world, India and Ireland, men were to attain an equitable conclusion without disorder.

If the debtor or defendant was of the chieftain class, which would include practically all who had any status enabling them to contract or to stand as surety for an offender (a bond labourer or fuidhir is distrained on, not by his stock but by his body), before the plaintiff began distraint proceedings he must fast on the chief. This practice, which has its counterpart in the "sitting dharna" of India (see Maine's *Early History of Institutions*, p. 298 *et seq.*), is effected by the creditor or prosecutor taking his seat at his adversary's door and refusing food until his claim is satisfied or until the offender agrees to refer the case to the decision of the Brehon. "Give me justice, or see me die of starvation at your door."

It is unlikely that at any time in either civilisation any member of the chieftain class ignored the challenge laid down. It was left to the twentieth century and to British politicians to meet by violence and torture this spiritual appeal to come to settlement by fair trial of the issue.

In this century the women suffragists, women of the highest personal character, acting with the most unselfish motives, attempted repeatedly to exercise their constitutional right under the Bill of Rights of personally petitioning the king through his ministers.

They marched down to Westminster again and again, waiting patiently in the street for an audience with the ministers who were afraid

to see them. Then (see the first chapters of Lady Constance Lytton's *Prisons and Prisoners*) they were arrested by the police for obstructing the police in the execution of their duty, and imprisoned with all the degradation of the commonest criminals. They replied to this injustice by fasting on the chief; they "sat dharna," they adopted a hunger strike in prison. And, to our undying shame, at the hands of the Home Secretaries and their subordinates they were met by the foul and indecent torture of forcible feeding.

In ancient Ireland, if the chief did not give a pledge to try the issue at law, to stop the fasting, the creditor gets double his claim; and the community surely did not allow the fasting plaintiff to suffer.

In *A.L. Irel.*, iv. 3, is an instance of taking possession of land to force appeal to law after thirty days of most technical observance of entry and demand. The plaintiff enters three times at due intervals, leading in the first instance two horses[1] by the bridles, and having a witness. He remains there a day and a night. Then there is a stay of ten days, during which he gives notice to the defendant. Then a second entry with four horses and two witnesses, and notice, and lastly with eight horses and three witnesses, where he remains until settlement. It may be a fanciful suggestion,

[1] The second commentator adds a case in which a female surety surrenders herself into the hands of a female plaintiff on behalf of a female defendant.

but I am inclined to guess that the use of horses points to an Eastern origin.

By the same symbolism women took possession in distress by sheep instead of horses, then by sheep and a kneading trough, and then by these and a sieve (*A.L. Irel.*, i. 149).

The cattle of women and boys could not be taken in distraint so long as there were some adults of the tribe or sept to be distrained.

The seizure, when the subject of distress is left in the debtor's hands, is made by symbolism: a stone is thrown over cattle thrice before witnesses; a stick is put on the henhouse or across the dog's trough; a tie on the anvil or on the tools, on the physician's or poet's horsewhip; a notice is given to the ecclesiastic not to say his Paternoster or Credo; or the harness is moved on oxen in spring time and they are prohibited from ploughing. Otherwise the distress remained in the debtor's possession (under a lien as it were) for a period of stay which varied, according to the quality of the thing distrained, from one to ten days or more: one day for all necessary things. When the stay expired, the distress, almost always cattle, was impounded,[1] unless the debtor would give security that he would try the case before the Brehon.

The distress was put into a strong place for safe keeping—a lisfort, dunfort, mainner pound,

[1] Geese and ducks were beasts for the purpose of rescue from distraint in the English law. (Y.B. 1–2 Edw. II., vol. ii. p. 149 (Seld. Soc.).)

scor pound (from whence such names as Lisburn, Dunboyne, Dundalk, etc.), or guarded if left outside, as otherwise the distrainor would be liable for loss. Each chieftain who distrained on behalf of the community had three enclosed fields or greens in which to house the cattle when necessary, so that they could in case of sickness be separated. The greens were to be on level land and not near the borders where the cattle might be driven off into an adjoining territory (*A.L. Irel.*, ii. 13).

Certain cattle and horses were in the first instance exempt, either "in their own natures" (*ibid.*, 39) to preserve purity of blood in a stock-breeding country, or as immediately necessary for tillage, or as the cattle of dignitaries who were exempt persons. In a case in Y.B. Edw. II., vol. v. p. 132 (Seld. Soc.) the bailiff of the Archbishop of Canterbury, who has taken two draught oxen in distress when he could have taken others, is sent to prison. So long as the debtor had land his exempt cattle could not be taken (*ibid.*, 45).

After a further period, in default of payment the distress was forfeited for debt and expenses. All this time the expenses ran against the debtor. *But the debtor might at any time avoid the distress by agreeing to try the issue before a Brehon.*

This, says the commentator (*A.L. Irel.*, i. 209), is the manner in which the distress with stay is taken: it is brought into a paddock,

and it is offered by the plaintiff to the defendant into his hand during the time of the stay, and a pledge is then given into the hand of the plaintiff for the distress during that time; and if the defendant does not give the pledge, although it was a distress with stay it becomes an immediate distress.

If, as would generally be the case, the debtor provided a kinsman surety of substance, who would almost invariably be his chief, to secure payment pending the trial of the issue, such surety was protected from loss by various means, by careful handling of the distress in proper places and at proper times, and by due notice (*A.L. Irel.*, ii. 15; see P. and M., ii. 185).[1]

The king had a steward bailiff, an unfree ceile, who assumed his liabilities in case of distress, as a Government department would do those of the king at the present day (*ibid.*, 95).

[1] He rendered himself liable for a fixed number of cows. His indemnity in case of loss was double what he was liable for and honour price (*A.L. Irel.*, ii. 133, 137). Read in connection with this, preface to Y.B. 17–18 Edw. III., R.S., as to warranty.

Part III : The Age of Transition

CHAPTER VI

THE CHANGE FROM TORT TO CRIME

All this for England, or at least for the southern half of England, very suddenly changed; that is to say, to us the change appears to be very sudden.

Very likely a long period of transition separates the old from the new law. Judging by the repeated call for the laws of Edward the Confessor, the change may have become most marked in the days when that Scandinavian-Norman king, after the dynastic struggles of the tenth to eleventh centuries, enforced some kind of peace on the Angles, Saxons, Danes, Britons, Norwegians, and Normans who made up the population of his England.

When in the twelfth century the Norman and Angevin lawyers begin to jot down memoranda of the customs in use, they still bid us assume a division for England into those customs in use in Wessex, Mercia, and the indefinite tract east and north which goes by the name of the Danelagh. It is in the twelfth century, apparently about the time of Henry I., that these customs are being written down under various titles—the laws of Henry, of

William the Conqueror, of Edward, of Canute, of Ethelred, and so on.

But it is not until after the middle of the century, when the powers of Aquitaine and Anjou win the English throne for Henry II., that we see the change in being; and then it appears to come with great speed and suddenness.

In that most revolutionary of all the centuries, under the influence of the East, of the idealism induced by the Crusades, of the reality of the Christian story brought home by a nearer knowledge of the Holy Land, of the rediscovered Roman law, of a world enlarged by contact with a greater civilisation, all forms of thought were in process of revision; great minds were questioning accepted beliefs and customs; the Western world suddenly ceased to regard murder, arson, rape, and theft as regrettable torts which should be compensated by payment to the family—such and other serious offences came to be regarded not only as sins for which penance was required by the Church, but as crimes against society at large to be prosecuted by the community through its chief; the ever-recurring blood feud was gradually discredited in men's minds; the transfer of the receipt of payment from the kinsfolk to the king disinclined men to favour violence.

The difference was not in the nature of the penalty; death, outlawry, or money payment were still the recognised penalties. But the

penalties went not to the kindred, but to the ruler as the representative of what is now called the State.

The State takes the Place of the Kinsmen.— The very core of the revolutions in law and finance that took place in Henry's reign was the transfer of the initiative in criminal matters from the kindred of the injured man, who might take notice or not of the injury as they pleased, to the king as public prosecutor; and the substitution, for the blood money paid according to the tariff through local arbitration to the kindred, either of payment to the king at the discretion of the king's judges according to the gravity of the offence, or the seizure of the offender's goods to the king's use by judicial authority.

If the offender was hung, the king took his goods; if he was outlawed, he took them; if he went through the ordeal of water and abjured the realm, he took them; if he committed suicide, he took them (*Som. Pl*, 805); if the king allowed the offence to be settled by compensation, he imposed such amercement for his own benefit as the judge, acting on local knowledge, thought the criminal could be safely made to pay.

The scramble for goods and fees which followed the change stimulated the development of English legal procedure and strengthened judicial authority; it brought about, *inter alia*, over the exemption of clerics from criminal penalties to be paid to the king, the murder

of Becket; and it ushered in an era of comparative immunity from recurring alternative family slaughters, which was an impossible hope so long as it was in the interest of the kin of the injured man to rely upon the terror of the blood feud.

The change did not abolish war. It only removed war to a different sphere, where the cause for it was less real, making of it a game for kings, as the rulers of great communities found that, by pleading a fancied offence as a cause for war, they could organise their peoples to obtain some advantage over a neighbour.

But war ceased very soon to be among the families and smaller groups of society a means of settling disputed claims or of punishing offences. The verbal and written conflict of the law court takes the place of the physical struggle in the field, and the king or his feudal appointee gets the benefit.

The Influences for Change.—From three different quarters came influences which favoured the change.

Feudalism, though its military effect was even then lessening, looked to the individual as land owner and land occupier as the effective agent of the social life rather than to the community of kinsmen. With the decay of feudal military use, individual right and ownership remains and continues to increase as a principle underlying all law and all legislation.

The Roman law, emphasising *dominium* and *proprietas*, the canon law drawn from it as

interpreted by the Bolognese jurists, either underlie the native customs, filling in the gaps between the customs of different localities as a common standing-ground, or attempt to override the common law as a controlling influence.

The churchmen, claiming to be tried in their own courts by law which was, or was derived from, the Roman law, began to lay down principles and to postulate of crimes and contracts.

Last, but by no means least, the Oriental code of the Jewish laws, the law of physical retaliation, the eye for an eye and the tooth for a tooth, the law closely related to the hideous conception of hell fire, dominated the moral sense of Western Europe, producing not only a distinction between acts of violence and breaches of social contract, but proposing physical penalties of horrible mutilation and death for the payments which among the Western peoples had hitherto satisfied all the wrongs and inconveniences of society.

This archaic law of an Eastern migratory pastoral society, a reduction to writing of customs far more primitive and savage than those of the most archaic society with which we have to deal in the British Islands, comes back from the Crusades accompanied by the whole force of the tradition of the Roman law recently rediscovered, of the Roman Church, and of the tendency towards federal power. It has exercised even up to our time

immense influence as to the quality of the wrongs done to society.

It was not to be expected that customs derived from a society which had for its hero Israel the supplanter, and for one of its heroines Rebecca who stole her father's gods, hid them in the camel furniture, sat on them, and feigned illness to escape detection, should place any high value on the plighted word, or should condemn breach of contract, which is the greatest crime against civilised life, in comparison with acts of violence.

It is an argument for a belief that the oldest of the Brehon law MSS. treat of pagan customs antecedent to Christian Roman influence that so large a part of them is devoted to contract, and that so great a censure is passed on those who broke their pledged faith. "Before the Norman Conquest," say P. and M., ii. 150, of England, "contract is rudimentary."

Tort becomes Crime.—Not all the changes which, as the pastoral life gave way to arable cultivation, transformed the communal society of landowners into a pyramid of military tenants of land with the king as the apex, had the drastic effect which followed the substitution of punishment for crime as an offence against the State at the hands of a judicial authority appointed by the owner of the court of trial, for the payment of compensation by the kinsfolk of the offender to the kinsfolk of the injured for accidents or

for acts of violence which were untouched by the idea of sin or moral evil.

Although the religious might preach that it was a sin to kill, the conception of killing as an offence against the community is co-existent only with the conception of the power and the will of the State to enforce penalties for offences against the community. So long as the overlord of the tribes, whether king of Ireland or king of France, contented himself with collecting customary dues and took no notice of wrongs as between individuals, except to assist for a fee when called upon in enforcing the payment of the customary compensation, crime as such did not exist.

The charge against John that he had murdered Arthur was affected by this change of opinion in morals which had come about since the First Crusade. It had not been an uncommon practice formerly to put inconvenient pretenders out of the way; no man was thought morally the worse for doing so, since it was in almost all cases a question of warfare between the two claimants, making such an act one of self-protection and self-defence.

Arthur, when he attacked his grandmother, had shown no sense of appreciating the more modern ideals of society. In later days the religious minors, Henry III., Henry VI., and Richard II., all suffer from their unwillingness to crush utterly their opponents by murder.

But since the Second Crusade the whole

conception of moral duties to society had changed. The charge against John had become one of crime not tort. It is true that no evidence was ever offered that he committed the crime, and it is questionable if he did commit it. But he was strongly suspected of it, and in those days strong suspicion was equivalent to conviction, the onus lying upon the accused to rebut the common opinion by offering battle, undergoing ordeal, or providing compurgators in defence.

We are now in international warfare in exactly the position of the tribal society when the blood feud and the blood fine were the measure of damage for evil.

Legal procedure long retains the stamp of the times when acts of violence such as homicide and robbery and breach of contract stood upon the same level. For example, in the English law the question as to the ownership of cattle bought was settled by an appeal of larceny.

Distress still continued to be the chief mode of enforcing decisions; it was an easy step that the distraint of cattle should issue from the court itself, as court procedure, whether royal, communal, or manorial, when the owner of the court instead of the kindred derived benefit from the result.

The change struck a fatal blow at the foundations on which the whole communal system of succession to property depended—the belief

that the right to share in the property of a man fell to those kinsmen who were in the first place responsible for the results of his wrong-doing, those who would share in his takings through the wrong-doing of others (*A. L. Irel.*, iv. 241 *et seq.*).

The possible small liability of each one of many of the family, which when the corresponding damages were shared amongst them encouraged disorder, became a large and valuable source of revenue when all the goods of an offender were liable to be seized to the use of the owner of a court, who had no claim of kinship. The kinsfolk gradually cease to be considered in the courts as responsible for the fault of the accused.[1]

The Frankpledge.—Their place is taken in the townships by the frankpledge, by which

[1] *T.A.C.N.*, c. 61 ("Des Paranz as malfeteurs"): "Li bailli le duc soulient prandre les paranz a aucun quant il avoit fet aucun mesfet," etc., although it might be that those whom they take (*pernoient*) had no part in the offence. No one in future is to be taken except the offender and his participators in the offence. *Ibid.*, c. 39 ("De Prison"): "If a powerful man shall kill anyone or mutilate him, and no one of the family follows him, the justice shall take the slayer. He shall be in the duke's prison until he purge himself by water." In 1126, David of Scotland orders that no one shall take any distress from the men of the church of Dunfermline "nisi pro proprio foris facto illorum" (Sir A. C. Laurie's *Scottish Charters*, No. 66). There is the same provision in a later charter in 1150 (No. 209). We cannot say how far such clauses are common forms inserted in a charter *ex majori cautela*, long after their use was gone, and when the monastic clerk has forgotten the meaning of the phrases, if he ever knew them.

the hundred protects or ought to protect itself against disorderly men dwelling within its borders. Judging by the records of the eyres, the townships were very casual about their duties in this respect.

The theory of the frankpledge was that everyone above twelve was to be registered in a tithing, a very small body, of which each would know the other, and in which each would have a common responsibility for the other's acts—an admirable conception so long as conditions make it possible.

The custom varied according to counties, some, such as Shropshire, having no frankpledge. In the boroughs, where the principle of kinship was early and easily broken in upon, the merchants' guilds or brotherhoods take its place.

The frankpledge gradually disappears. When the easiest way to escape from the consequences of crime was to move to another hundred, the burden became too great. The very amercements on the township which ought to have registered the criminal in its frankpledge, and the township which sheltered the man who had no business to be there, killed out the system by combining all the local men against federal authority. The harbouring of a fugitive from the law, or a person charged with crime, was one of the most serious offences, certain to involve the persons concerned in serious loss of money if not of life; it was dangerous to give an un-

known man a night's lodging. A man shelters two strange beggars, a man and a woman. The man cuts the woman's throat in the night and flies. The man who sheltered them has to find pledges (*Cor. Rolls*, p. 74, Seld. Soc.).

When convicted, on the other hand, it seems to have been very common for the criminal to pay to be allowed to abjure the realm. The great object was, and always is, to pass the objectionable alien on to another district. Every collection of custom provides for moving on the unknown tramp from one district to another, unless he were a bard who could tell a story or sing a song. In *A.L. Irel.*, i. 123 *et seq.* (the rules as to stay after taking distress), provision is made for the difficult removing of a vagrant, the commentary explaining that the tramp who "had no habitation but the road" was to be taken to the boundary of the territory "holding him by the collar." They were not concerned with the happenings on the other side.

By the Danish and Norman laws (*L.H.P.*, c. viii. sect. 5), by the laws of Canute (c. 208), William I. (c. 48), by the Assizes of Clarendon and Northampton, by the Brehon laws of Ireland, by the Welsh laws, the stranger could only stay in the territory for at most a very few nights unless he could find a native to become his surety, or unless he had some exceptional cause for delay.

As the wandering merchant had no kinsman

to be his compurgators, he organised guilds of brethren to swear for him.

Mediæval society has no use for the loafer or the tramp of any class. Says the *T.A.C.N.*, c. 38 ("De Receteurs"): "All should take care that they do not receive fugitives in their houses; for if the outlaw is taken in anyone's house the receiver will lose all his chattels and be in peril of his life and members. If the outlaw dwells for a certain time in any town, the neighbours seeing him, all the town and the lord of the town if he dwells in the town are punished by the loss of all their chattels."

Persons who keep company with thieves and murderers (says the *Etablissemens de S. Louis*, c. 32) are liable to the same punishment as them. If anyone has nothing (ch. 34) and is in the town without any means of living, and haunts taverns, he is to be questioned how he lives. If the justice comes to the conclusion that he is lying, and that he is one of a bad life, he ought to be chucked out (*bien jetter*) of the city.

The Stage of Transition.—But though, under Henry's new procedure, the Assizes of Clarendon and Northampton (Hoveden and Benedict of Peterboro', 1176) had legalised indictment and presentment in the place of appeal by private persons, the right of the kinsfolk to prosecute by appeal remained, and only slowly died away. (*Som. Pl.*, 859, 880. A man who falsely represents himself as a kinsman is in mercy.)

In the early days of Henry III. the justices seem to have been trying experiments in the gradual substitution of prosecution by the Crown for private appeals. The chief difficulty was, and is, to induce the individual to feel himself personally responsible for an honest administration of the law. The fact that the compensation went to the king and not to the kinsfolk did not of necessity check appeals, if the kinsmen by threats of retaliation could induce payment from the accused to them. It rather tended to increase the liability to compromise by promotion and then withdrawal of charges, the appellor being in mercy for some small sum, which would be well covered by his gains from the person he appealed.

The period 1154–1272, say P. and M., "was the moment when old custom was brought into contact with new science." "It was a perilous moment." "There was danger of premature and formless equity. On the other hand, there was danger of . . . a refusal to learn from foreigners and from the classical past."

At Henry's accession, after the civil war, the legal administration was in an exceptionally confused and uncertain state. He came to the throne with all the power of the great French territory from the Channel to the Pyrenees behind him, far more influenced by the canon law and by the revived Roman law than Stephen could have been. If he were

an ordinary dull man, in his enforced exile of youth with his mother, he must have had opportunity of observing the effects of feudal law, of tribal custom, of Roman tradition side by side, as they could not be studied together in any one part of the islands. So throughout his reign, by means of revolutionary changes of administration, by grants of courts to lords and ecclesiastics, and particularly by the regular circuits of his justices, he strengthened the power and the influence of the kingship, and with it the Church, over the old communal courts, and extended the operations of the king's courts to matters of which they formerly had no cognisance, both legal and financial.

How came about the increase of the king's power in England?

CHAPTER VII

THE KING'S PEACE

THE change is no product of any genius of any particular race for freedom or for law-abidingness: it has nothing whatever to do with the angelic nature of Henry II., or the lion-hearted absence of Richard, or the diabolical wickedness of John; it comes at some time over all the Western States which are touched by the sceptre of Rome.

You may see the change in progress in the *T.A.C.N.*, in Beaumanoir's *Coutumes des Beauvoisis*, in Pierre de Fontaines' *Conseil à mon Ami*, in the *Coutumes d'Alais* as in the Orkney Records, as well as in Glanville and Bracton, and the Year Books, and the records of the king's courts and of the eyres (or wanderings, from the Latin *iter* or Old French *eyre*. "The eire of justize wende aboute in the londe." Robt. of Gloucester, line 88).

How soon it came, in what form, what mark it left upon the society touched, how far and how quickly it could draw to itself, could incorporate in its system of courts of record, the traditions and the powers of the old communal assemblies of the county and hundred or cantrev—the king's court holding

with regard to them, and to the jurisdiction of the manorial courts of the chiefs, the position both of a court of first instance and of a court of review and of appeal,—depended for the most part upon the strength of the federal power.

In England the change came the sooner and was the more complete on account of the extreme "malleableness" of the Saxon in the south, on whom the system mainly fell, and the unusual strength and wealth of the English king. Even though the reactionary barons in John's time check for the moment by various provisions of Magna Charta the growth of the kingly authority which was so prejudicial to their own little jurisdictions, Edward is able later by legislation (*Quo warranto* and others) to restore the balance of authority.

But the French king was not until much later in any position to enforce his federal jurisdiction over the whole territory of which he was technically king. So different was the feudalism of France from the feudalism of England; the feudal tenants, the duke of Normandy or the count of Anjou, observe the customs of the district in their ducal courts, making their own regulations and law irrespective of any court law of the French king. The revived Roman law, the canon law, rivals and conflicts with the feudal law of the French and Scottish royal courts as well as with the local custom. When Pierre de

Fontaines writes down for St Louis the customs of the Vermandois, he seeks to derive their origin in every case from the Roman law and from the edicts of the Roman emperors. His work is written, he says, "de fermer un jeune gentilhomme dans le science des Loix Romaines," which he applies to the usages of the baillage of Vermandois.

The same conditions, aided by physical obstacles, stand in the way of the spread of the authority of the Scottish king at Edinburgh and Scone over the west and north. "The public prosecutor, the State tax-gatherer, could not set his foot within a well-chartered jurisdiction of regality," a condition only altered after 1745 by the statute 20 Geo. II., c. 43.

The great Marmoers (Skene, "Maermors"), the mayors or rulers of very wide districts, such as Moray, Buchan, Mearns, Mar, and Angus, exercised the most complete authority in their dominions. There were, when the Scottish Estates met in 1283 to regulate the succession, thirteen of such mayors or earls, of whom only five represented either by descent or through females the southerner, the others being Celtic earls who looked on while Saxon Scotland, headed by the Norman Bruce, fought Edward for Scottish independence.

How little authority a Scottish king might have even in those parts under his own immediate authority may be seen from the contemptuous language used towards the king by his parliament in 1398: "Whare it is

deliueryt that the misgouuernance of the realme and the defaut of the keypyng of the common law sulde be unput to the king and his officeris, and therefore gife it likeis owre lorde the Kynge til excuse his defautes, he may at his lykynge gerr call his officeris, to the quhilkis he has gifyn commission, and accuse thaim in the presence of his consail. And thair ansuere herde, the consail sal be redy to juge their defautes, syn na man aw to be condampnyt qwhil he be callit and accusit" (*Acts of Parl. of Scotl.*, vol. i.).

In consequence the French and Scottish kings overcame much later the difficulties in the way of the acknowledgment of federal authority which had given way at an earlier date before the exceptional power of the Angevin kings of England. The exceptional power had made it more easy to introduce and use the principle of the Roman maxim—"Quod principi placuit legis habet vigorem."

The Obstacles to Federal Unity.—The difficulties were considerable. The process of change had to overcome violently the very serious obstacle of a normal condition of society in which the overlord's claim to enforce his immediate authority over the districts controlled by the lesser kings and chiefs was confronted by their separate claim to jurisdiction: it was the conflict of the king's and the chief's "peace."

The difficulties were twofold. So long as the idea of kinship governed society, the blood

feud would, by its very nature, be submitted to the head of the family, to the local chief, to the tribal king, all akin by reality or by fiction, each having an authority, a power of enforcing peace, in a widening circle. There was an objection, rooted in a sentimental tradition, to the intrusion of a stranger as judge, similar to the feeling which prompts the Irishman of to-day to insist that he shall govern himself (badly, no doubt) in the place of being asked to pay for the officials who administer for him the beneficent rule of England, Scotland and Wales.

The second difficulty, in those days the most important, lay in the fact that, though the kinsmen received compensation for injury, the chief who through his Brehon controlled the settlement took his fees. His right to preside over the settlement of trouble was a valuable financial right to be jealously guarded in his own personal interest, and he was not willing to give it up to the king.

But no conception of benefit to the community seems to have entered into the composition of the king's or chief's peace. The circle within which injury or disturbance was to be compensated to him was a privilege to him, a support of his dignity, a lucrative perquisite that he and his immediate surroundings should be free from disturbance. That was all. Each chief and king jealously guarded any interference with such immediate jurisdiction from without, and sought to

increase its scope. Only the Catholic Church of Rome stood outside any such limits, claiming the whole Christian world as its parish for the punishment of sin.

The distances within which these limited prerogatives could be enforced, and the penalties for their violation, are most carefully defined in the archaic codes of custom (Laws of Cnut, ch. 2, 28; Edw. Conf., ch. 23; Wm. Conqueror, ch. 48; *L.H.P.*, ch. 10, 80 (Thorpe)).

In the Irish customs (*A.L. Irel.*, iv. 227, the Law of Inviolable Precincts[1]), the "peace" of the king or chief, his right to protect the fugitive from immediate vengeance, is measured according to rank by spear-casts, increasing with the wealth and power of the chief, the length of the spear being estimated as four feet between the iron head and the horn on the handle. The radius of the protection within which compensation for violence will be adjudged to the chief extends from one spear-cast for the boaire chief to sixty-four spear-casts for the king.

The spear-cast of course became a definite distance. The precinct of a cathedral was 2000 paces; of the church of a bishop, saint, or hermit, 1000; diminishing for lower ecclesi-

[1] This pamphlet is generally adjudged to be very late, as it quotes the Senchus Mor as the "great cas of the ancients." But it is more likely that it shows the extreme antiquity of the older book, as the measurement by spear-casts is hardly likely to be late, even on the unlikely assumption that the whole was a manual for students.

astics. To be legal, the protection to a fugitive in a precinct must be agreed to, but the Church could stretch the protection without a guarantee that justice should be done (*A.L. Irel.*, iv. 235). It is well worth while going back to Deut. xix. to view the right of sanctuary as it appears under the Jewish theocracy.

There is no compensation for violation of a precinct in the case of a hired soldier, because "it is likely that he will go away from him without necessity" (*ibid.*, iv. 231).

The conditions may be illustrated from every part of the islands and the territory on the Continent under Henry's control.

According to the *T.A.C.N.*, the duke's peace extended to an attack on any man in his own house or at the plough, lest anyone wrongfully cultivate another's land.[1]

By the Assize of King David of Scotland, c. 14, assault "within gyrth or any place quhar the pece of the kyng or of the lord of the tenement beis askyt" is compensated by "ky to the king and to the man and his kindred"; c. 15 provides a punishment for assault in the king's court (*Acts of Parl. of Scotl.*, vol. i.).

[1] "Li conte e li baron e tuit li home sont tenu par leur serement a garder la pes le duc e leal justice" (*T.A.C.N.*, xxxvii. 1). "Se aucun assaut home dedanz le porpris de son meson, et il li fet sanc o arme esmolue, il l'espencira par les membres; se il l'ocit il en recevra mort" (*ibid.*, 2). "Autresi a la charrue. La charrue doit estre en la pes le duc e en sa defansse; il garde cels qui la mainent. Ja soit ce que aucuns ere a tort en autrui terre" (*ibid.*, 2).

In the statutes of William the Lion of Scotland (1165–1214) it is provided that anyone breaking the king's peace against one in sanctuary or claiming it, if he threatens to strike he pays 4 kye to the king and 1 to the man; if he strikes without blood, 6 kye to the king and 2 to the man; if he draws blood, 9 kye to the king and 3 to the man; if he kills, 29 kye and a young cow to the king, and make peace according to the country to the friends of the defunct (*Acts of Parl. of Scotl.*, vol. i.; Skene, *Regiam Majestatem*). He also took notice of offences affecting military efficiency.

The king's peace covered offences committed in his presence, and all disputes to be decided, wherever in his rapid movements he might be, within a recognised limit of his court, in his fortresses, and in fact in all places where his personal safety and convenience were concerned. The privilege was of value to him in more ways than one. He could fill his exchequer and at the same time extend his authority by granting his "peace" to a town or district, implying that any offence there committed, or any matter there arising of which the king would take notice if committed within his own official precincts, should be treated as a breach of his peace. He extended his protection always over the Church, punishing breach of sanctuary as a breach of his peace.

The first written evidence of the federal

character of the English kingship, evidence that his authority was not confined to a district covered by his real or fictitious presence, is that provision of Magna Charta, ch. 17, which lays down that "common pleas shall not follow our court but stay in a certain place."

Roads and Bridges.—But the one mode in which, as I think, the king's peace tended to increase, in which he made his presence felt thoughout the country, was by his responsibility for the safety of the highways, and of the foreign merchants who travelled upon them. The bands of armed French, Scandinavians, and Flemings, who brought merchandise from abroad, needed protection not only from physical violence from the natives and from robbery on the road, but from unjust charges brought against them as strangers by men supported by kinship. As they had no kinsmen to stand for them, whether in battle or on oath, the king had to take them under his protection. Accordingly we find in all the early societies importance attached to the care of the roads by the king, and regulations for the protection by him of merchants.

The *T.A.C.N.* shows the conditions under which the king assumed control of the roads and protected merchants: "Li conte e li baron e li chevalier, qui avoient la garde des chemins en leur terres, trestoient malement les marcheaux e les autres, qui passoient par les chemins e tolient as innocenz e a leur

primes leur deniers; . . . il establirent felenessement e deslealment en leur terres paages e trenz, qui por ce que il furent establi des pieca ne pucent pas estre abatu del tout. Por eschiver tel force e tel toute li dus, qui doit governer tot le peuple, gardera les chemins si en pes que se aucune asaut autre en chemin e il li fet sanc e plaie e il est pris, il l'espencira par les membres e, se il l'ocit, il em perdra la vie. . . . Se marcheauz qui passe par chemin doit a aucun ne il ne sa marchandise ne seront pris par chemin fors par la main a la justice le roi" (xv. i. 4).

"De quatre chemins, ces est a saueir Watlinge strete, Erminge strete, Fosse, Hykenild; en aucun de ces quatre chemins ocist aucun ki seit errant per le pais ce asaut si enfreint la pais le rei" (Laws of William the Conqueror, 16 (Thorpe)).

The *Leges Henrici Primi*, x. 1–3, include among a most miscellaneous collection of the "jura regis" "in terra sua," breach of his peace, injury to persons of his "familia, slander of him and so forth, outlawry, theft not punishable with death, murder, coining, arson, housebreaking, *cowardly assault* ("forestel"), harbouring fugitives, premeditated assault, robbery, *destroying highways by closing, turning, or ditching*, rape, fighting in his court or house, desertion, neglect of the *trinoda necessitas*, harbouring excommunicated or outlawed persons; and it mentions *all highways as in his jurisdiction* (Soca).

The roads in the islands, whether those left by the Romans or the old British and Irish grass roads, formed a very important element in social history, as being, except for navigable rivers, the only means of communication between different hamlets. Both Ireland and Wales would seem to have been well supplied with roads of a sort, roads which entered much into the life of the people. They were apparently all grass roads, cleared from time to time by trimming the grass and weeds, making a way less liable to wash or to fall into deep ruts than land of which the surface had been cleared. This was clearly the opinion of the people at the time; the Welsh laws impose a penalty to the lord for ploughing up a road, "but not for sowing or harrowing it, since there is no penalty for improving it," and they give the measure of a lawful road as a fathom and a half (nine feet). (*A.L.W.*, Anom. IX. xxv. 5.) Among the subjects of distress in the Irish laws are the cleansing of roads in time of winter and in time of a fair, and the cutting away of brambles and thorns (*A.L. Ire.*, ii. 123–7).

There were different grades of roads then as now. Besides the lawful roads of the Welsh laws, every habitation ought to have a by-road to the waste of the trev, of the measure of seven feet, and two footpaths—one to its church and one to its watering place (*A.L.W.*, Anom. IX. xxv. 6, 7, 8): provisions for pastoral necessities which would well explain the dif-

ference of arrangement between corn-growing Hitchin and the more moist west without dragging in racial differences. The Irish laws provide different compensation to the king and to the geilfine (group family) chief for injury to his principal and to his byroad (*A.L. Irel.*, iii. 307); and it is explained that the principal road is more the peculiar property of the king than of the geilfine chief, and the byroad more of the geilfine chief than of the king, like the distinction in the English law between the king's highway and the county road. The paragraph contemplates the seizure by them of straying cattle. (The king or chief has all found on his road, except a share to the finder: *A.L. Irel.*, iv. 195.)

There would appear to have been plenty of these roads, at least in the pastoral parts of the islands—which again has no particular connection with Celts or Teutons: a man does not like driving lively cattle through briary woods; he wants an open path. The brewy's house must be at the meeting of three roads, along each of which he is to have a man watching for company (*A.L. Irel.*, v. 77). In mentioning damage by the trespass of swine, the tract (*ibid.*, iv. 103) says that the "swine should be in a stye at four roads by night, and that they should have a swineherd by day"; whence it is said (in a lost tract, translation conjectural) "if there be a swineherd the fine is increased, for their stye should be at the meeting of roads that lead into the middle of

farms which are partitioned into small divisions, each coarb's division being marked and divided by furrows," an arrangement not so very unlike the cultivation at Hitchin described in Mr Seebohm's *Village Communities*.

It is also laid down by the Brehon (*A.L. Irel.*, iv. 279) that the value of land is increased by "a wood, a mine, the site of a mill" (water power), "a highway, a road, a great sea, a river, a mountain, a river falling into the sea" (a waterfall for water power), "a cooling pond for cattle, and a road." In the commentary the roads are differentiated as "a road leading to a chief or to a monastery, a head road that leads to a wood, a great sea, or a mountain, and a roadway leading to a pond or land or to a highway."

The traffic on these roads in early days has, I believe, been much underestimated, especially by writers who since the coming of railways have forgotten the conditions which were immediately before them. The self-supporting hamlets needed many convenient byways for their constant interchange of products, as well as for the movements of their stock; the king protected on the highway, which adjoined to the lesser road, the merchant and the pilgrim, who brought to the hamlets the commercial and spiritual luxuries of which they had need.

As happens in all states of society, the local man had little interest in the condition of the highway along which travelled the alien merchant with his wares, and the servant of

the abbey with his grindstones, so that the highways got yearly into a worse condition and required fresh expenditure for commerce from the overtaxed king. He is obliged to see that the bushes and briars are kept cut back so that the robber cannot attack the merchant on the highway by forestel, that the ways are not foundrous, and that the bridges which span the wide and shallow rivers are kept in repair. He has to fight the local man on all these points; the man who can use a boat for his local needs, who has no insight into the necessities of commerce or the convenience for movements of troops, and has no wish to be at the expense of cutting and hauling a new log to repair the bridge for the use of the abbot or the alien merchant protected by the king. Let the king repair the bridge, and when he had repaired it they would have a squabble with him over the expense of doing the work. Meanwhile the king's power increased, as the power of the London police increases, because he was willing to shoulder responsibility, and to take his chance of making the community pay, by blackmail or otherwise, for the protection he gave them.

Pleas of the Crown.—The king's jurisdiction finally ousted the communal courts and tended to control the courts of the barons, because the king, being persistently itinerant, carrying high justice in his train as he passed through the country, and sending his judges at intervals on eyres to collect revenue and to inquire into

local conditions, his courts could give a hearing which, if not as speedy, was very likely to be more impartial than the court presided over by the local great man, which would most certainly be more satisfactory to a man whose local reputation was in any way tarnished.

So long as the justices were sent on occasion, so long as cases only came before them when the king happened to pass that way, there was no likelihood of a suggestion of the sole jurisdiction of the king. If the case in the interval was dealt with by authority at all, the sheriff tried it and settled for the chattels with the Exchequer.

In the first instance the king's officers dealt only with causes civil or criminal which concerned the king, and with such offences only as affected the king's peace and public order. The words in use at the present day, "against the peace of our lord the King, his crown and dignity," date back to the time when he had no business to interfere with matters which did not concern his peace. The offence charged before the justices must have been proved to be against the king's peace. For example, where in 1202 (*S.P.C.*, p. 8) an appeal of robbery is brought at Lincoln, the county and wapentake say that it is not of the king's peace but of the sheriff's peace, so that the suit is in the county court. The offence was not one for which the king was to get the money. So to recoup himself the jurors who presented it are amerced. In another case a parson is

accused of encroaching on a road, as of the king's peace. It turns out not to be a king's highway, and is referred back to the county. (See *Glouc. Pl.*, 68, abd. 260; *S.P.C.*, 112; *L.H.P.*, c. 10 and c. 70, and c. 80, sect. 7; *T.A.C.N.*, c. 15.)

Glanville gives us as pleas of the Crown, *lèse majesté* or sedition, concealing treasure found, breach of the king's peace, homicide, burning, robbery, rape, and *crimen falsi*, explained (book xiv. ch. 7) as forging charters, making false measures, coining, etc.; and as pleas of the sheriff, theft, medleys, blows and wounds, unless the accuser charges that the offence was committed against the king's peace.

Still, apart from the king's right to initiate proceedings and take compensation or inflict exemplary punishment in matters which affect him personally, compensation to the kindred appears to have remained as the normal mode of redress for injury in the islands at Henry's accession in 1154.

The Assize of Clarendon (1166) would appear to have made only a difference in the procedure in the first place, the ordering of an inquiry into charges of robbery, murdrum, and great thefts before the king's justices and vice-counts of the shire, instead of in the county court. The inquiry was to be made of men of the townships and the hundred in which the alleged offences had taken place; but this did not prevent proceedings being taken by the kinsfolk, which continued for a very long time

to be done. The assize also declared that the jurisdiction over such offences should belong only to the king, ousting the sheriff's authority to try such cases at all.

The declaration that the king was to have all the chattels of these offenders was merely an example of what is so very frequent in these early attempts at law-making—a declaration of existing custom. Murdrum (not homicide) and robaria were among the miscellaneous perquisites of the king mentioned in *L.H.P.*, c. 10; and the author of the *Dial. de Scacc.*, bk. ii. c. 10, notes a difference between plunderers, who are also called open robbers, and those who steal privately. The goods of the first, he says, go to the treasury, but of the latter to the sheriff by whom they are taken and punished. It is questionable whether the inquisition by the townships and hundreds was more than such a declaration of custom which in the stormy times of Stephen had fallen into abeyance.

Part IV: Courts of Record

CHAPTER VIII

THE RISE OF THE FEDERAL COURTS

The change which came very swiftly and suddenly on England when Henry brought to bear the force of Aquitaine as well as Normandy and Anjou, coincided with a more regular holding of the eyres and a more persistent effort of the king to enforce his jurisdiction at the expense of the inferior courts. After Clarendon the power of the king's courts grew very rapidly at the expense of the sheriff. Such alteration would have been impossible had not the king been possessed of abnormal power. But the Crown had grown so exceptionally strong as to be able to declare law for society from outside the community without obtaining its consent, and it was able to offer as a privilege its courts to complainants.

Yet if one went back some twenty-five years the old system appears to have been in full use. The *Leges Henrici Primi*, a collection of unknown authorship of the customs in use in England in the first half of the twelfth century, treats the customary compensation to the kindred as the usual means of appeasing the blood feud arising out of criminal torts. By the end of the century the principle that the

Crown prosecuted for all serious crime, and that in place of payment to the kinsfolk the lord of the court took the felon's goods or imposed a money payment at pleasure, appears as the equally fixed and usual procedure.

The royal courts were soon crowded with civil business, and they gradually take the business from the communal courts and control, and to their great discontent supplant very largely in matters of civil claims the franchises and local courts of the smaller men.

It is not, I think, of much value in a general narrative to speculate on the many causes, ranging from new theories of morality to financial pressure, which all moved in the direction of change; but if we ask by what means the change from compensation for the kindred to forfeiture to the king was brought about, the answer is, that it was not by legislation in the sense of the enactment of new laws—a process becoming familiar only through intimacy with Rome, a process which, except as a manipulation of custom or as a very exceptional exercise of arbitrary authority liable to sharp retort, was almost unknown.

The change came about by the extension of the king's peace through changes in administration of existing customs. As his power became more diffused, reaching into the remoter parts of the country; as he or his hard-riding justiciars traversed the land, holding eyres or extraordinary county courts for the transaction of all business, social,

financial, and legal, that required attention; he gradually drew to his court, as being stronger and quicker in action, all those matters which concerned grave offences or prominent men. The list of matters which belonged to him as of right, bringing him in revenue as chief of the military power, compensation for desertion in time of war, repairs of castles and bridges, the protection of merchants and clerics, offences on the highway, and so forth, was gradually extended to include all serious crime.

The old system remained embedded in the common law; but it was so scribbled over by exceptions at the hands of the king and his nominees, that little was left of actual effective law or procedure under the older system. The kinsmen still had the right to sue, but the chief's commission had eaten out their profits of litigation. The king had come to claim as against the kinsmen, in place of a mere fee as chief, for his offices in a settlement between them, the entire goods of the offender, and mulcts on various grounds from many parties for the benefit of the community as represented by himself.

The Advantages of the King's Courts.—The advantages to be gained in the king's courts as against the local or baronial courts in civil causes must have been very great indeed that suitors who had a choice crowded to the king's court paying for entrance, in spite of the inordinate delays, risks, and expenses

caused by following the king in his military expeditions as he travelled through the British Islands and France. The clause in Magna Charta which orders the court for the common pleas which do not concern the king to remain stationary at Westminster strikes at an evil of procedure which must have been an equal or even a greater burden in the time of Henry or of the absent Richard than in that of John, if we may judge from the classical case of Richard d'Anesty.

In his efforts to obtain his land, this man followed the king for some five years. Among the places visited during this period were, besides places in Normandy and Aquitaine, Salisbury, Southampton, Ongar, Northampton, Winchester twice, Lambeth twice, Maidstone, Canterbury three times, Mortlake, London twice, Stafford, Wingham, Westminster twice, Oxford, Lincoln, Rumsey, Windsor, Woodstock, and twice to Rome (Palgrave's *Commonwealth*, ii. ix xxvii; and Stephen's *Hist. of the Criminal Law*, i. 8889). For his expenses he had to borrow from the Jews at the rate of nearly 87 per cent.

The advantages in civil causes were no doubt very great. The king's courts permitted that the question of the individual ownership of land, which would be the most common cause of dispute, should be settled by the verdict of an assize or jury of twelve knights, instead of by battle at the choice of the defendant (Glanville, bk. ii. ch. 3 *et seq.*);

and they further gave a speedy and easy remedy by possessory actions, amongst them those of Mort d'Ancestor and Novel Disseisin, in which, leaving untouched the question of ownership, a jury decided the right to the present possession of land, where a claim is made that since a definite recent date fixed by the king's court a man has been disseised by another.

But leaving to one side these causes for satisfaction, which, although they played a great part in early law and so in history, are now mainly matters of antiquarian research, the popularity of the king's authority may be seen to rest on another basis.

The Arm of the Law.—In addition to giving an opportunity of dispensing with the battle and giving a chance of greater impartiality away from local opinion, away from the pressure of the influence of great men which it was the chief credit of the king's court to weaken, the king's court did what no communal court, whether English, Welsh, Irish, or Norse would do: it enforced its own judgments. Let us view this feature from what can never have been a popular form of justice, federal or communal—justice which men feared far more than they loved, the enforcement of criminal or police laws.

When the communal court had given a decision, it lay with the community to enforce it if it chose. The man who disobeyed the decision was outlawed; he carried the wolf's

head; his kinsmen were absolved from giving him assistance; the kinsmen of his opponent were not answerable for violence to him; his property might be seized by anybody; he was outside the law which he declined to obey.

But for the family of the sept to carry out the decision of the community, or to enforce civil claims, was a matter of difficulty and of considerable danger. A man of violence always had a large following, willing to share the plunder and to give him notice of attack, and was aggressive in proportion to his separation from communal rights. So the result was only too often a compromise which gave the savage bully a breathing time in which to plot future evil; peace without victory, as an American President might call it, or as the same thing has been more neatly expressed by Wordsworth, "that they should take who have the power, and they should keep who can."

The king perpetually on the move with a military force behind him, his justices carrying his powers into remote parts in his absence, had a longer arm to enforce obedience than any private person or clique of kinsmen; it was to his interest to discourage private war as a means of settling disputes; and the knowledge that he was ready to fall on the disobedient and hunt down the outlaw made for the enforcement of his decisions without violence. This in itself was a sufficient reason for the popularity of his court. In its every

provision it discouraged private war (*A.L.W.* Anom. v. ii. 122, 133; and *T.A.C.N.*, c. 31).

But the king did not despise the use of the communal courts as a basis for his own royal justice. The eyres held at long intervals, which developed into the assizes which still form our mode of bringing the king's court into the locality, were but exceptional meetings of the county court.

The County Court.—All matters in which the king had no personal concern were disposed of in the assembly of the county or county court presided over by the sheriff and, until William I. removed him, by the bishop, and in the assembly of the cantrev or hundred, which was the unit of administration and had a very extensive jurisdiction over a variety of local matters. There is, I believe, no written direct evidence of it, but these moots of the county and hundred, which met periodically to discuss and dispose of all business of every kind which concerned the community, corresponded almost certainly to the assemblies of the old divisions of the tribe and septs.

They were the descendants of the tribal assemblies, the Things and Folkmoots, held in the open air for the discussion of all questions affecting the community, for the settlement of all disputes, for the proclamation of new regulations agreed upon, and as a corollary trading fairs and places for collecting, branding, and sacrificing cattle.

Stonehenge was probably such a place, and

Sevenoaks, and the hill of Ward in Ireland, and the Tynwald in Man, and Tingwall in Dumfriesshire, and Dingwall in Ross-shire, and the hills of Scone and Tara, and the hill of Ellon in Aberdeenshire, and Lejre in Denmark, and Upsala in Sweden, with very many other places of the same kind.

As they were not courts of record, there is nothing except analogy from Iceland or Norway to show the legal procedure in these courts, or that in matters of local disorder they did anything beyond supervising the payments to the kinsfolk and the wite to the sheriff or owner of the court.

The county court held every month, and in great force twice a year, was the central assembly for all financial, judicial, and military business.

We have no definite record of the procedure in this court, but there is no reason to suppose that it differed in any way from that of other communal courts of which we have fuller accounts.

All the freemen were supposed to come as a public duty. In early Norman times the priest attended, with the men of the township, and the county in theory outlawed those who did not come when summoned. It is not very likely that under communal government any serious penalty was, unless for very urgent reason, inflicted on those who did not attend; but as the communal courts became the courts of the sheriff, of the bishop, of the franchises,

the non-attendance of the suitors was used to get fines for the owner of the court.

For instance, in the Records of the Regality Court of the Barony of Spyne (Spalding Club, ii. 119 *et seq.*), a barony created in 1451 out of the lands of the church of Murray, a long list of absentees, headed by the Earl of Huntly, are fined in 1597 "fourte" pounds each for "not giffin suite and presence to this head court."

When the freemen have come, they appear to take no part as a body, either as judges or jurors or assessors, so far as any enforcement of the specified penalties for tort was concerned. They will be called on to speak to current rumour and current reputation in their vicinity, possibly to pronounce on the form of the ordeal; but apart from such assistance, they represented merely the common sense and public opinion of the community present to see fairplay in any appeals, as accusations by the kinsmen or person injured were called, and to attend to the other public duties of communal life which formed by far the greater part of the business transacted in these courts.

Though the sheriff, or even the bishop, presided in the county court, he delivered no judgment and introduced no novelties into the customary penalties or the customary procedure, only using his good offices to reconcile neighbours and to suggest the terms in which a compromise could be effected.

Beyond that, the procedure and the judgment were settled by immemorial custom; "on transigeait moyennant une somme legalement fixée ou l'on combattait pour un tort leger comme pour un crime atroce, et dans certains cas, l'accusé pouvait recouvrir aux éprouves judiciaires de l'eau et du fer."

Owing to the immense wealth and wide possessions of the Angevin kings, and to the immunity from perpetual war which the connecting strip of silver sea between England and France afforded, the transition from the communal procedure to the practice of the king's courts came earlier than in France, and, escaping the inquisitorial procedure of the revived Roman law, which was adopted on the Continent and in after times used for the prosecution of heretics, combined with the transition features of the communal custom.

The king's officers hold an inquiry, an inquisition into local affairs; but the freemen in the courts become accusers for the community; the grand jury indict the offender in the place of the appeal of the kinsmen.

Of the matters dealt with in the county court, criminal law formed only a very small part—the greater part of the business was financial, concerning the king's revenues; and of the greater part of this criminal jurisdiction the Assize of Clarendon, 1166, and of Northampton, 1176, deprived it, leaving the sheriff's turn in much the same relation to the

king's court as the committing magistrate and petty sessions of to-day.

The sheriff, the king's reeve, his appointee to govern the shire in the royal interests, would appear to have been an official in the first instance only for a term or for life, during good behaviour. The king kept a careful eye upon him, and set his under officials and his coroner to keep watch on his movements.

Of Scotland Sir John Skene tells us that by the old law the sheriff-clerk, the legal adviser of the sheriff, was "input and output by the king and had na league nor bands with the schireff," the clerk accounting to the king for the revenues. Where the Crown was weaker, as in Scotland, the sheriff's office tends to become heritable.

Where the sheriff of Dublin has claimed 100 shillings as his fee for putting a man in possession of land granted to him by the king, Henry III. forbids it, saying that it was the custom of England for no sheriff to demand more than one ox for giving seizin of lands (Close Rolls, 2 Henry III.).

Twice a year the sheriff ought to visit every hundred in his county, seeing to the men being in frankpledge, exacting fines on summary trial for little offences, and taking particulars of the greater ones which were to come before the king's judges at the eyre. He questioned the representatives of the townships as to their presentments, and the justices at the eyres tested their answers by the

sheriff's and coroner's rolls, and by further questions.

The Eyres.—The county had to appear at the eyre, which was only held at long intervals, by its freeholders; the townships and hundreds by their representatives. It was an assembly of all the freemen of the county, and of freemen only. The county declared the customs, such as the proof of Englishry, and they displayed to the justices the whole social and financial condition of the county.

The procedure at the eyres was presentment by a jury of twelve knights or freemen of the hundred, and four men of each vill or township of the hundred, who swore as to their suspicions and beliefs as to the offence. The four men of each vill became by custom confined to four men of the four nearest vills or townships, as being the persons most likely to know the facts. (Hoveden, A.D. 1176. See Laws of Ethelred, iii. 3; William I., i. 6; Edw. Conf., 9, 22 (Thorpe); Bracton, 7, f. 139*b*.) The man whose cattle had been lifted ought to raise the hue-and-cry by going to the four nearest townships, the "four quarters of the neighbourhood," to proclaim his loss.

Everyone gives pledges for his cattle, in right of co-occupancy of land, to the two neighbours next him on the two sides and the two ends (Senchus Mor, i. 237 *et seq.*). The Irish procedure seems to have been similar to the English. Where there has been a killing, and a man is suspected only: "if they

had not seen him (coming) from them or towards them at all (at or after the killing), the case is ruled by cetharaid, the four points"—stated in note to mean the four townlands nearest to the place to which he had been tracked from some other place—"and culaird, the back points"—stated in note to mean the four townlands nearest again to the four points—"with respect to him, and it is ruled by trustworthy or untrustworthy witness with respect to them" (*A.L. Irel.*, iii. 119–27). Notice of the hound in heat, and of the mad cow, to be sent to the four nearest neighbourhoods (*A.L. Irel.*, iii. 273).

The neighbouring townships had generally knowledge of the facts from the coroner's inquest; the man who first finds the body notifies the four nearest neighbours (Sel. Cor. Rolls, p. 45, Seld. Soc.).

In the Records of the Regality Court of Spyne (Spalding Club, ii. 119), the appellor or partie persewar in 1592 claims that the summons for an assize should have been directed to him as such, that he might summon an unsuspect jury; to which the bailie replies that, knowing of no partie persewar, he had summoned "a condigne number of assyse *of the four halfis about.*"

The English assize answered a set of interrogatories propounded to them by the justices as to the affairs of the hundred both civil and criminal.

The weak point of the whole English pro-

cedure was that the inquest was not final. The appeals dragged on for years (*e.g.*, *S.P.C.*, Nos. 91, 92, 93, 115), and it was a common occurrence for a litigant to offer money to the king that he might have an inquest to try an issue. In the *Glouc. P.C.*, in case after case presented by the jurors most of the persons concerned were already dead. One case was at least twelve years old (*ibid.*, 434).

In *S.P.C.*, 54, Northampton, 1207, Richard, accused of killing William's father, says that in King Richard's time the wife and brother of the slain man appealed him, and he was imprisoned, and an inquest being taken he was found not guilty, and discharged on finding pledges to stand to right on the coming of the justices in eyre. When they came an inquest found him not guilty. The suit was adjourned to Westminster. Then the appellors bring a writ of King Richard ordering an inquest. The inquest acquitted him. The suit was adjourned to the justices making eyre in Northampton. They order an inquest, which acquits him. The suit is again adjourned to Westminster. After a full hearing he is adjudged quit. He offers 15 marks that he may have an inquest on this matter. A day is given to hear judgment. There seems to be no reason why the suit should not still be going on now. (And also *ibid.*, p. 8.)

The Jury.—Very often the same jurors who had presented a man declare him not guilty when he puts himself upon the county. They

were bound under pain of amercement to present the common or even occasional rumours. But in giving their verdict they might ignore the rumour.

The jurors were not judges; they were in the nature of witnesses; their verdict was their sworn testimony, but in almost all cases it was testimony on suspicion only, backed by the suspicion of the district, which arose from rumour full of tongues,[1] and it was always liable to be met by a charge of spite and malice (*de otio et atia*), or by the verdict of a special jury from another district for which the defendant had paid to avoid local prejudice (*S.P.C.*, Essex, 1220, pp. 127, 705), or by bribery of the appellor or of the jurors themselves or of others (*S.P.C.*, 83), or by a conflict of the oaths of the jurors with the oaths of some officials, which counted for more than those of ordinary jurors (*S.P.C.*, 30; bailiffs *v.* jurors, 33; county and coroner *v.* jurors, *ibid.*, 127[2]; *A.L. Irel.*, iii. 131; *A.L.W.*, Ven. II. v. 1, 2), or by some special defence which

[1] *T.A.C.N.*, c. 51 ("De Prison"): "Toz mesfez de que homs est mal renommez met le malfeteur em prison par la justice, ja soit ce que nus ne l'endemant riens, si que il sera tant em prison que il soit purgiez par jugement d'eve."

[2] County and coroner *v.* jurors. The coroners were elected knights of the county. Their duties were to hold inquiries over persons killed, to receive declarations of approvers and confessions of persons who had taken sanctuary, and to hear the preliminary steps of ordinary appeals. They inquired into treasure trove and wrecks and kept records.

avoided the facts sworn to, such as a defence to a charge of robbery that the landlord has taken goods in distress (*P.C. Glouc.*, 99).

The duty of juror was at all times a dangerous one. Where the jury had made a false oath (Y.B. 16 Edw. III., vol. i. p. 62), the court adjudges that they "lose their free law for ever, and that their chattels be forfeited and their lands and tenements be seized into the king's hands, and their wives and children thrust out and their houses and lands wasted, and that they be taken and the tenants be amerced," etc.

The ordeal was abolished in 1215, battle fell into disuse, and an inquest by a jury became the usual mode of prosecuting offenders. As the offence to be tried before the justices, whether itinerary or at Westminster, must be against the king's peace, and as the king as accuser could not fight the accused, the only form of trial, unless the proceedings were on appeal by the kinsmen, could be by the jury (see as to the modes of trial, *P.C. Glouc.*, p. xxxvii *et seq.*).

The jurors must be lawful men—*legitimi homines*, *leaus hommes*. The phrase occurs again and again in England, Scotland, and Normandy for the jurors in legal proceedings. It may have had a signification of property or of status. *T.A.C.N.*, c. 27, says that the jury to be chosen by the justice are to be such as are not of kin to one party or the other, nor their man, and have no sign of hate towards

either. This would seem to be a pious wish. The jury grew out of the compurgators who were the kinsfolk of the man for whom they swore. When the ties of the group family were stronger, it would be pretty hard to choose a local jury not akin to one party or the other.

T.A.C.N., c. 26: "The assizes are held by the knights and lawful men. Everyone ought to be judged by his peers; the baron and the knight, who know the ordinances of the law and who fear God, can judge the one or the other; but it is not permitted for a villein or any other of the people to judge knight or clerk." *L.H.P.*, xxxi. 7: "Unusquisque per pares suos judicandus est, et ejusdem provinciæ." xxxii. 2: "Nemo dominum suum judicat vel judicium proferet super eum cujus ligius sit." Assize of King David, cc. 4, 5 (*Acts of Parl. of Scotl.*, vol. i.): The judgment to be made by the suitors of the court and then delivered by the justice, sheriff, or bailiff. Each man to be judged by his peers and not by a lesser. (And see cc. 14, 15.)

In almost all cases where the provisions of Magna Charta are of any value, it simply restates an ancient customary law which has either fallen into disuse or been abused. No doubt the great local men were inclined to pack the juries of the inquest with their unfree dependants. If the same thing was done in the interest of the king it accounts for the clause 39 in Magna Charta, which has been so

much misinterpreted to mean modern trial by jury. It is, however, not unlikely that, the Charter being a general declaration of the customs of the country, made with a view to abolish "omnes malas consuetudines," this chapter was not directed against John or any person in particular.

The juror must make up his mind quickly. The assize does not tell how a man was next heir in the mode required by the court. Roxbury J.: "You shall tell us in another way how he was next heir, or you shall remain shut up without eating and drinking until to-morrow morning." The assize at once revises its answer in the way required. (Y.B. Edw. I., 21-22, p. 272.)

After the inquest was sworn they could not agree. Stanton J.: "Good people, you cannot agree?" (To John Allen, apparently the marshal:) "Go and put them in a house until Monday, and let them not eat and drink." On that commandment John put them in a house, etc. At length on the same day about vesper time they agreed. Then Stanton J. gave them leave to eat (Y.B. 4 Edw. II., p. 188).

Can one wonder that perjury is looked upon leniently as a common offence? By comparison fighting it out seems logical and sensible. We now allow them to disagree at the expense of the litigant who has to pay for a new trial.

CHAPTER IX

PROCEDURE AND PUNISHMENT

Compurgation. — While this inquest, this opinion of the men of the district who should know the facts on the issue raised, was very slowly and gradually shaping itself into trial by jury, there was, besides the trial by battle and for men of bad character the ordeal, one universal form of defence from which the jury took its rise. It is called in the Year Books "waging his law": an oath taken by the defendant denying the plaintiff's claim—an oath taken generally on relics, supported by an oath to the same purpose taken by a body varying in number of kinsfolk or friends, who would otherwise have fought his battle or helped to pay for his tort.

The oath of the accused alone was very naturally looked upon with suspicion even when it was sworn upon relics, especially if he were a doubtful character. It was necessary that it should be supported by compurgators, his kin, who would swear to their belief in his innocence, and who were liable if the oath failed.

The Welsh law (*A.L.W.*, Ven. II. v. 1, 2) directs the swearing on relics in case of conflict

of evidence. and compurgation for debt by oath of seven—the debtor, four kin of the father, and two of the mother,—the compurgation to take place in church at mass. It must always be remembered that the value of a man's oath varied with his wealth and his rank in society.

For murder the oaths of three hundred men of the kindred are required, showing that kinship meant the wide relationship of the group family; for theft, twelve or less, according to the value of the thing stolen. If the oath fails, if the witnesses to character are not forthcoming, the thief has to pay £7 or be exiled. (*A.L.W.*, Ven. III. i. 17; ii. 13, 21. See Ven. III. i. 12; and Anom. IV. iii. 2, etc.)

By the Assize of King David, c. 11, in Scotland: "If the king appeal any man of felony, he shall purge himself of the oaths of 24 leil men" (*Acts of Parl. of Scotl.*, vol. i.).

Churchmen were supported by other bishops or priests, as the cleric had no kin outside his order. Even the most prominent persons were not exempt from this rule, though when a large number of oaths had been sworn for a great personage the result was decisive. Pope Pascal, who had been undoubtedly privy to the murder of two officers of his court in 823, successfully anticipated accusation by taking his oath of denial with a number of bishops as his co-swearers (Eginhard, *Annales*, 823).

In April 1194, Richard I. makes peace

between Geoffrey archbishop of York and William bishop of Ely his chancellor, on the terms that the bishop of Ely should make oath "at the hands of 100 priests" in denial of the charge against him (Hoveden, anno 1194). On the other hand, compurgation by a few men, not of necessity kinsmen, was a usual mode of settling small matters of dispute in the manorial courts (*S.P. Manor*, Maitland). But in the more important matters of the royal courts, compurgation fell gradually into disuse. It was in effect the test of public opinion. Could a man get sufficient of his own family, in face of locally known facts, to swear boldly on relics that they believed in his innocence? As the ties of kinship decayed, local reputation in the form of the juries of the hundred and townships took its place. A man was convicted or discharged on his local reputation, not by the oaths of his kindred.

As trial by battle loses its popularity, as the necessities of trade require a more peaceful mode of settlement, compurgation becomes the more usual method. It is noticeable that neither the Records of the Exchequer of Normandy, nor the *Etablissemens de S. Louis*, nor Beaumanoir, nor Pierre de Fontaines mention compurgation.

Where the question at issue was one between two persons in a restricted locality such as a borough, generally between persons engaged in crafts and trades whose credit in their business rested on a known reputation, this waging

of law was for some time in use as a regular mode of procedure in both civil and criminal cases.

The burgesses claim as a privilege, and support stoutly, this right of compurgation in the place of combat. The citizens of Lincoln, for instance (*S.P.C.*, p. 39), claim that according to the king's charter they need not plead outside the city walls (except the king's moneyers and servants), and need not fight the duel because of any appeal, but should wage law with compurgators according to the liberties and laws of the city of London.

This method of trial was very largely used in the courts of the franchises for deciding petty questions between persons living in the same locality, about which there would be local knowledge. (See as to the wager of law and its dangers, in this connection, the introductory note to the "Precedents of Court Keeping" by Maitland, pp. 16, 17 of *The Court Baron*, Selden Socy., vol. iv.)

But even in such confined districts as the borough, compurgation as commerce increases becomes a doubtful risk and an impediment to trade.

It could be used in the hands of a crafty man to defeat a just claim. In an action of debt, for instance, where the defendant claims to make oath with twelve compurgators that he owed nothing, the plaintiff unsuccessfully tries to force him to go to a jury (Y.B. 20 Edw. I., 306).

To correct this the lawyers begin to introduce a third person, to count that the defendant had received the article in question at the hands of a third person, and so to oust him of his wager of law and force him to go to a jury.

Where in such a case—a loan of money, for instance—the facts as between two persons might be known only to those two, the witnesses who swore to their belief in the truth of the statement of the one who denied might be of value. It was highly likely that they would take some pains to acquaint themselves with the facts and would know something of his reputation.

But their oaths could be of little value as affecting the credit of third persons from whom the person for whom they swore had received.

Surety and Warranty.—The inherent weakness of such a system, in which a conflict of hard swearing of the persons involved was the only evidence for and against the facts relating to acts of violence or indebtedness, was supplemented to a great extent by a custom of insisting on the giving of pledges and sureties, thereby introducing, as interested in performance of a contract, persons not primarily involved. For instance, the buyer of personal property, such as a horse or an ox, takes surety from the seller for warranty of soundness, ownership, and capacity (*A.L.W.*, Anom. VIII. i.). He must be prepared to produce his surety in court. ("Every con-

tract is dissolved by the Feini which has not surety of the community"—*finé*, group family. *A.L. Irel.*, iv. 206, last line.)

The liability of the surety was very great, as he stood in the place of his principal as to chattels and life and limb, and was liable to the loss or punishment which the principal had incurred. The son of a surety was liable for his father's suretyship (*T.A.C.N.*, c. 52, "Des Pleges"). Anyone who was pledge for a suspected person was to produce him in court. If he does not appear, the pledge is punished by the loss of all his chattels, etc. (*A.L.W.*, Ven. II. vi. 27). The Irish law gives a distress with stay of one day only against a surety who evades justice (*A.L. Irel.*, i. 215).

The effect of this system, it would appear to me, would be that the head of the family, group family, or tribe would always be surety for the offender, gaining constantly in power and wealth by the acceptance of responsibility for his family. If the chief undertook the dangerous office of surety he was undoubtedly highly paid for his risk.

A.L. Irel., i. 197, *comm.*, says that where distress is brought against all the family together, the distrainor is safe in distraining any one of them. By the thirteenth century the communal society was breaking up in England. Magna Charta, c. 9, provides that the surety is not to be distrained so long as the principal can pay.

Persons who had no legal status of contract could not be sureties. "No one is to give an alltud (stranger) as surety, nor such as may be more powerful than himself; nor a monk, nor a friar, without the consent of his abbot; nor a clerk of a school, without the consent of his master; nor a woman, unless she be the debtor's lady paramount; nor a son without the consent of his father whilst under his authority; though such as these should become surety, their suretyship is not to be enforced" (*A.L.W.*, Dim. II. vi. 23). Whether a woman could be a surety varied (*ibid.*, Ven. II. vi. 32).

This matter of surety and warranty illustrates a close connection in early law between contract and tort. Where an article is claimed and it is suggested that it has been stolen, and the defence is that it was bought, the defendant, unless he can bring witnesses who can prove the sale in open market registered by the proper officer, must produce the warrantor from whom he received it, who in his turn may produce the seller to him. But by a curious provision, which for some reason is found in all the customary laws, it can go no further than the fourth person. (*T.A.C.N.*, c. 83, "De Garant": "Outre le quart ne puet l'en nomer garant.")

This custom of warranty was intended, no doubt, to prevent in the first instance cattle-lifting, which must have been in the pastoral parts of the islands such a seductive operation.

The family were not likely to tell on a man if he brought home some else's cow; the only chance of proving the theft, if he had not gone too far, lay in obliging him to show from whom he had bought it. The Assize of William the Lion tries to provide against cattle-lifting into the Highlands as far as possible by warranty. (C. 3 and c. 5. No one to buy anything without lawful pledges. If the pledge cannot produce his principal, he must pay to the challenger triple value and give the king eight cows. The principal to be outlawed.)

Punishment.—To return to our king's courts. The first thing that strikes one in the enforcement of their judgments is that, except for sentence of outlawry for those who ran away, as everybody did when there was the slightest ground for suspicion or prejudice, executions and personal punishment for crime were extremely rare. It was not for want of savagery in the punishments which could be inflicted.

Under the influence of the Mosaic law of retaliation and of Roman tradition, the most cruel punishments were designed for offenders. William I. orders that offenders shall not be hung or killed for every crime, but "enerventur oculi et abscindantur pedes vel testiculi vel manus ita quod truncus remaneat vivus in signum proditionis et nequitiæ suæ" (Laws of William I., iii., 17 (Thorpe)).

In a case in *S.P.C.*, p. 123, Hertford, anno 1220, an appeal for a mare stolen, the last warrantor is condemned "mercifully" to lose

his foot. He may have been a perfectly innocent man who may have bought unknowingly from a thief, as the warranty could not go beyond the fourth.

In days of scanty population, when every fighting man was a valuable asset, men could not have been anxious to inflict death or mutilation on sound men if they could deter from crime in other ways. It was an argument in favour of trial by battle that the physically best man, at a time when physical health was very necessary, generally won. It was an excuse for the refusal to a woman of the right to appeal anyone, except for rape or the death of her husband, that she might hire a very powerful Scot as her champion to do battle for her against some innocent man. A woman appealing a man for her father's death and for a wound to herself (*S.P.C.*, p. 13, 1202) is defeated because her husband will take no notice.

The only savage sentences seem to have been on women (*S.P.C.*, 34). A woman in case of death had apparently perjured herself, though she does not seem to have been concerned in the murder except as a spectator who told a lie about it. "She has deserved death, but by way of dispensation let her eyes be torn out" (*ibid.*, 123). A woman is present with her husband at a murder. "Let her be burned."

Women as a rule had no money to pay for acquittal. One hopes that the people appointed

to execute these savageries did nothing and lied about it; but in view of the savagery in human nature which breaks out from time to time, it is not safe to assume this.

However, these cruelties were the exception; in the ordinary way justice was satisfied by forfeiture of goods or payment of money to the king. Generally the prosecution broke down and the criminal got off. But he or someone else had certainly to pay in goods or money on some technical plea. When he was convicted or ran away and was outlawed, his goods fell to the king. So far as personal punishment went, the system could have been no deterrent to crime.

Persons in Mercy.—The noticeable fact is that in the course of the judicial proceedings the Crown benefited by a system of money penalties at the discretion of the judges (see Magna Charta, c. 20), which fell on all alike—on the criminal, on the prosecutor, on the sureties of either, on the county, on the townships, on the hundreds, on the frankpledge, on the sheriff, on the coroner, on the sergeant or bailiffs, on the jurors. Someone, or some corporate body, always was "in mercy" for some want of preparation, some neglect of precaution, some injudicious perjury, some fear of local revenge, some unhappy sympathy with local crime, some desire to let ill alone, some want of knowledge of law or custom, of what offences belong to the king and what to the county, or for having an opinion of one's own contrary to

common belief (a juror who disagrees with the others will be fined, *Glouc. Pl.*, 238), or for not complying with the provisions designed to check secret killing (murdrum). Apparently it was safer and better to come and be fined than to stay away and suffer all the power of the king. In the iter at Launceston (Y.B. 30–31 Edw. I.) the coroners are called up. "And as to those coroners who did not come, the sheriff was ordered to go to their houses and turn out the wives and children, and take their lands into the king's hands until they should come."

The reader may the better understand the impartiality exercised in the collection of money for crimes, torts, and police offences in the course of legal administration by the king's justices in England from the following few examples of persons "in mercy" on different occasions:—

In *S.P.C.*, Lincoln Eyre, 1202, the sheriff is in mercy; and the county for an irregularity makes fine with £200 to be collected throughout the county, franchises excepted; and the jurors are frequently amerced.

In Y.B. 30–31 Edw. I., p. 240, the commonalty of Cornwall agree to pay £80 for irregularities.

In *S.P.C.*, Warwick Eyre, 1221, in an appeal by a widow for the murder of her husband the jurors say that after the deed the murderer went about his business, but was not arrested until the day before the coming of

the justices. The sheriff in mercy. The widow appeals five men as accessories. They do not come. She had sued at several county courts after her husband's death, and they had not been outlawed or attached. The county in mercy. The township of Spernal admits that they were all dwelling in Spernal and had not been arrested. The township in mercy.

In *S.P.C.*, Bedford, 1202, Elias slew Roger and fled, confessed the death and adjured the realm. He had no chattels. To judgment against the sergeant for not summoning the hundred and the townships to sit on the dead man. The father of the slayer is in mercy for not raising the hue-and-cry on his son.

S.P.C., Lichfield, 1203, Simon was slain as he was returning from an ale. The slayer fled. The jurors say he was not outlawed. The jurors are in mercy. The county and the coroners say the same. But the coroner's and sheriff's rolls show that he was outlawed. The county and coroners are in mercy.

S.P.C., 1202, p. 8, the jurors are in mercy for presenting a robbery as being a breach of the king's peace where it was of the sheriff's peace; and in *S.P.C.*, 1221, p. 112, where an appeal is made in the county court for robbery, when mention had been made of the king's peace, the suit was attached to the coming of the justices.

Som. Pl., 1242, No. 832, a beggar woman is killed by the fall of a branch. The sheriff and coroners made no attachment. They are

in mercy. The price of the branch is 5d., for which the sheriff must account.

Ibid., 833, a man is found drowned. His wife found him but does not come. She and her pledges are in mercy. No Englishry, therefore murdrum. The jurors presented that he was English. They are in mercy. He was buried without view of the coroners. The township is in mercy.

Glouc. Pleas, 1221, No. 251, jurors are in mercy for false presentation; 257, jurors and coroners are in mercy for concealing suspicion.

Som. Pl., 1242, a house is burned, a man's wife and sons burnt in it. No one is suspected. The first finder does not come. The men who attached him are in mercy.

In *Glouc. Pl.*, 1221, the following are also in mercy:—No. 3, the sureties of the accused for his non-appearance; 6, the sureties for the prosecutor for his non-appearance; 250, the township as criminal was in its frankpledge; 251, the township which has harboured a criminal outside its frankpledge; 253, the township which knew of crime and did not arrest the offender; 255, the township as criminal was in township and not in frankpledge.

The Value of Justice.—Whatever the result of the case, someone always paid something to the king. If he chose to allow them to make agreement as in the old fashion, he took a fee for his permission; *e.g.*, *S.P.C.*, 1208, Norfolk, a man charged with a death is ordered to procure one of the slain man's family to be made

either a monk or a canon, and to give to the kinsfolk of the slain 40 marks. This compromise by the king's licence, for which the king was paid 40 marks.

Shortly before the present war, speaking, I believe, in reply to a suggestion that anyone aggrieved by the proposals for segregation of persons of weak intellect could appeal to the law, one of the best of our legislators made the true remark that the attitude of a poor person in face of the law is that of a domestic animal before a wild beast: he is helpless, and he knows it. The simile was equally forcible in the days when men who might be accused of crime fled to the woods at the coming of the king's justices.[1] According to Henryson, the local Scotsman had no greater love for the eye than the Cornishman:—

> "This wolfe I liken to ane schiref stout
> Whilk buyes ane for fault at the king's hand,
> And hes with him ane cursed assyse about
> And dytes all the poor men upon land
> Fra the Crowner have laid on his wand."

To the king, and in a less degree to the sheriffs, bishops, abbots, and lords of manors—in fact, to the official world,—administering justice was an immense engine for raising revenue. Of course, the officials took advantage of the system to extort money for not enforcing the law (*Glouc. Pl.*, 245, 246,

[1] "Anno 1233: Eodem anno fuerunt itinerantes justiciarii in Cornubia: quorum metu omnes ad sylvas fugerunt" (Annales Monastici, R.S., 36, iii. 135).

405 : murders let off with fine), or imprisoned a suspected person in order that they might take money for granting bail. The dread of worse things to come upon one inclined both prosecutor and criminal to pay for letting well alone by withdrawing the appeal (*S.P.C.*, 11 ; *Glouc. Pl.*, 101), or by avoiding the verdict (*S.P.C.*, Suffolk, 1212 : accused who has abjured the realm offers the king a mark to be allowed to return). The multitude of officials lived on the country (see as to sergeants and taverns, *S.P.C.*, 110).

CHAPTER X

THE CROWN AND THE LESSER COURTS

THE chief justification of the king's eyre was that, whether in the hands of Henry, John, or Edward, it was the main check on the abuses of feudal local jurisdiction. John's judges, for instance, were notable men of high character (see Maitland's preface to the *Gloucester Pleas*).

The kingly authority over local and popular courts was increased by encouraging an appeal to the royal court from other courts, civil and ecclesiastical, and by discouraging appeals to Rome, as well as by the originating in the king's courts of causes which had previously been settled by the local authorities. But it was also very largely increased by the sale or transfer of the hundred court to local magnates, and by allowing the creation of private courts or franchises of the manor (see Stubbs, *Constitutional History*, i. 104; Vinogradoff, *Eng. Society in the Eleventh Century*, chapter on "Franchises").

The Court of the Hundred.—The hundred court, attended very unwillingly by all freemen, or by their deputies if they paid to be excused personally, was based most likely in

its origin on a hundred families united by a common bond of kinship. North of Watling Street it was called the Wapentake. Its transfer to the local barons was very natural, as it dealt with the enrolment of the freemen as soldiers, with the system of frankpledge (a modification or development of the responsibility of kinsmen for one another by which a man in the community was registered as a member of an association mutually responsible for each other's acts and omissions), with the transfer of land, with disputes arising out of the agricultural system, and with local petty offences.

The king's authority, exercised first by himself on his rounds and by the eyres of his justices, and later by their regular circuits for all purposes, was the only check on the misuse of these courts by the barons and higher clergy; the struggle between them, told for the most part by the monastic partisans of the barons, did not end on that account until far into the reign of Henry VII., each party fighting fiercely for the valuable penalties accruing from the procedure on crime. The king keeps a sharp eye on the baronial administration on the one hand—he holds an inquest in 1170 on the sheriffs, the local great men, and removes them in favour of his own officials for malfeasance in office; and on the misuse of his authority on the other. The Assize of Clarendon contains provisions for the entry of the sheriff into all castles for view of frankpledge,

and against interference with his power of arrest.

The Conflict for Court Profits.—The royal jurisdiction grows in strength and apparently in popularity until Richard, going to Palestine and taking with him everyone who could exercise constructive authority, threw the whole of administrative justice to the wolves. When John, who had not been especially educated as the constitutional sovereign who took his ideas from his ministers. came to a bankrupt throne, indebted for his safety to a minister who had been seriously compromised by raising money for John's predecessors, he was not inclined from sheer goodness, as of course he ought to have been, to relax, in matters which concerned revenue, his father's prerogative.

The result was that when the barons and the higher clergy attempted to regain for their courts, by what is called Magna Charta or Carta, the powers taken from them, they inserted some very reactionary provisions. At a time when all procedure was in a transitional state, both the king and the barons were trying to draw into their courts profitable business. Henry and his sons had been eminently successful, and had been well served in this by the judges of the king's court, the sheriffs, and their other officers; it is not surprising that the barons tried to take the advantage from them.

It is useless to try and read this and like

writings by the light of the monastic annals of the thirteenth century, with their glosses of the seventeenth and nineteenth, directed at the king personally, unless we also try to create a fair appreciation of the evils which the kings, even the least popular or the least worthy, were trying to remedy.

If history is of any value, the virtue lies in that it repeats itself in the perpetual struggle on the part of the community, whether represented by the chief, the Brehon lawyer, the king, the Church, or, when all fail, the revolutionary leader, to repress the greed of the individual and to circumvent the corruption of the officials appointed to control him.

John's mistake, if he were really culpable, would seem to be that his weak position, both military and financial, forced him to stand in with the great barons and overlook their oppression of others, until as patriots they rebelled against him, instead of instituting an inquest of sheriffs like his father.

The result of the extension of the royal jurisdiction was that when a powerful baron was accused of any high crime for which his local influence would prevent an impartial trial in the communal courts, he might be compelled to stand his trial before the well-watched justices of the king instead of before a tribunal, manifestly favourable to him, of his peers (see Magna Charta, ch. 21, 39). After John's death the weakness of the Crown permitted immense evils resulting from the un-

restrained power of the great nobles, unrestrained except by civil war, in which the constitutional historian, following the monastic chronicler, has generally favoured the baronial side.

Trailbaston.—At the end of the reign of the English Justinian, John's grandson, robberies and acts of violence, under the shield of the local great man (as you may see again later in the *Paston Letters*) had become so common and had met with so little punishment that Edward was obliged in 1304–5 (33 Edw. I.) to issue commissions of trailbaston to cope with them. The articles of Lincoln of Trailbaston (MS. in Cambridge Univ. Lib., Dd. vii., 6, set out in vol. xl. of Socy. of Antiq. of London, p. 89 *et seq.*, "Original Documents illustrative of Criminal Law in the Time of Edward I.," by F. M. Nichols) are eloquent of conditions which called for the strong hand of the king, when the interests of the community in the safety of society had disappeared with their interest in the land.

The articles propound that these gangs of robbers, maintained by the great men, (1) forcibly seize landed property, and when about to be ousted by legal proceedings hand it over to great lords to continue by force; (2) prevent jurors at assizes from declaring the truth by threats of maiming; (3) are hired for battery and assault at so much per piece; (4) obtain purchases or leases of land by threats of violence; (5) plunder householders and

force them to hold their peace by threats; (6) hire men to forcibly disseize others; (7, 8, and 9) impede and corrupt constables, bailiffs, and king's officers and those employed by them; (10) violently resist the king's levies by beating and ill-treating the bailiffs; (11) commit homicides, murders, and arsons by day and night; (12) go by night with force of arms and beat people and break doors and windows of honest folk; and (13) seek occasion to quarrel, and then, pretending that they are injured, get compensation.

Yet the remedy might be worse than the disease. The Statute of Westminster II., 13 Edw. I., recites that "sheriffs feigning many times certain persons to be indicted before them in their turns of felonies and other trespasses, do take men that are not culpable nor lawfully indicted and imprison them and exact money from them."

Very soon indeed, as might be expected, the evil side shows itself in the new system. The profits of a criminal court invite a greedy impatience for convictions, leading to packing the inquest with unfree men and officials; the better class of men get themselves excused by the sheriff from what is a burdensome duty; in the end the barons of John's day have strength in their contention that a man shall be tried by his peers, not by unfree men who are in the fealty of the man in whose court they undergo trial; the fines become merciless as the unfortunate king, expected to pay all the

steadily growing expenses of the nation out of stationary means, sees in crime an opportunity for increased revenue; the barons and the Church are asking what benefit accrues to them; and the lord of the manor in his court mulcts his unfortunate people for every little trespass with a view to revenue, with the same disregard of justice or of public benefit as the magistrates who at the present day inflict fines for obstructing the police or selling bootlaces in the street.

The Advantage of Compromise.—What a strong inducement there was to compromise a claim out of court, how useless and how dangerous it was to appeal a man for crime if there was any chance of a technical defence, may be illustrated from two cases from the Northumberland Assize Rolls.

Henry III. makes a bailiff, who had without cause imprisoned two women without food or drink for days, pay 60 marks to him as compensation. The women only earned the bailiff's ill-will.

Again, a woman appeals a man for the death of her sister. He replies that he is a cleric and is claimed by the bishop of Durham. She appeals another man, and he replies that no woman can put another to the law for the death of anyone, unless for her husband killed in her arms. He is upheld in his plea, which is good law, and the woman is sent to gaol for a false appeal. The facts are apparently not denied. Still, one meets with many cases

where such appeals are allowed: *e.g.*, Sel. Cor. Rolls (Seld. Soc.), pp. 18–23, a woman prosecuted for the death of her son; p. 32, for the death of her brother.

While the regular eyres occurred at intervals of several years, the king issued special commissions of Oyer and Terminer to dispose of particular cases which appeared to be pressing. These commissions, it appears by a petition on the Parliament Roll of 1315, became great engines of oppression in the hands of powerful men.

When some powerful man wished to injure another, says the petition, he accused him of a trespass, and procured a favourable commission which appointed a day of which the defendant either receives no notice or too short a notice, the sheriff being party to the fraud. He is heavily fined. Then he is given a day in some upland inconvenient village where the prosecutor is so powerful that he dares not appear, or if he does appear has grievous bodily harm, or has to agree to do more than is in his power; or a jury from distant parts is procured which knows nothing of the trespass. In consequence he is tremendously fined, and imprisoned until payment, or outlawed.

An example later of the same dangers incidental to the abuse of trial by jury meets us in the Cal. Pat. Rolls, 1331, p. 127. Roger Mortimer, the paramour of Edward III.'s mother, enclosed common land in Worcester-

shire with a dyke. The commoners fill up the dyke. Mortimer brings action of trespass, by means of jurors dwelling far from the said land, his steward being sheriff of the county. The commoners were convicted, as they dared not appear for fear of personal injury, and were fined £300. Edward III. gave them back the money.

The arm of the king did not reach into the remote corners often, leaving a good deal to local enforcement. When he did send justices into such places, it was for the most part only to pass sentences on men who had opportunely fled.

For example, in 1255 (Northumberland Assize Rolls, Surtees, 88), Henry III. ordered his justices to hold pleas of the Crown for the regions comprising the liberties of Hexham, Tynemouth, Tynedale, Carham, Norhamshire, Islandshire, and Bedlingtonshire, the northernmost part subject to Henry, between Scotland on the north, and on the south the jealously guarded palatinate jurisdiction of the bishop of Durham. The Assize was to recoup Henry, by money penalties, felons' goods, and deodands, the expenses of a recent expedition to Scotland, where, on Balliol paying him a consideration, Henry had compromised matters between him and the other Scottish barons and Henry's son-in-law Alexander, who had married Henry's daughter Margaret in 1252.

Seventy-seven persons were prosecuted for murder. Four were hanged, one abjured the

realm, and seventy-two were outlawed. At a later assize in the same district in 1279, of sixty-eight murderers two were hanged, one abjured the realm, and sixty-five were outlawed; while of one hundred and ten accused of burglary and other such offences, twenty were hanged.

In such a district as this, where the criminal could hop across the border on either side, and where it was not to the king's interest to pursue him, there grew up a system of lynch law for criminals and for prison-breakers of those days. The men of the district, without waiting for the often long-deferred eyres of Henry's justices, pursued the outlaw, and when they caught him executed him on the spot, sometimes "presente ballivo Domini regis" (Surtees, 88, pp. 73, 79, 80, 84, 320, 360, 548, etc.: "Statim insectus et captus fuit et ibidem suspensus"). On one occasion "tota villata Novi Castri" pursued the criminal. When captured he was "decollatus secundum consuetudinem Regni."

The same hurried judicial execution is recorded in Ireland Calendar of Justiciary Rolls, 1297: "The Cross of Kildare comes by twelve men, and presents *inter alia* that a thief who was imprisoned in the castle of Balymor in Co. Dublin escaped; the constable of the castle followed him to the bridge of the town and there beheaded him, and threw the body in the water of Athlynify."

But the results were pretty much the same

in those parts of the country where it was worth while to pursue the criminal into the next shire. Investigation of the Pleas of the Crown for Gloucester in 1221, the Pleas for Somerset, 1201 *et seq.*, or the Select Pleas of the Crown, show a very similar condition of affairs. In the eyre held at Lincoln, for instance, in 1202, out of twenty-two appeals only two succeed.

The civil side of the law was then, as it is now (witness the Slingsby baby trial), a ruinous gamble. Richard d'Anesty was only one of many men who followed the fleeing shadow of the law as it "wende through the land."

The same principle applied on the criminal side.

It was out of and by means of this breakdown of what we might call justice that the popularity of the king's courts grew.

Frequently, when they appear to have a good case, the litigants compromise. For instance (Lincoln, 1202), in an appeal for slaying the son of the appellor, the dead man before death accused the person charged, and the jurors of the wapentake, where he was slain, say that they suspect him. But the appellor withdraws the charge and is amerced in one mark (*S.P.C.*, p. 11).

But there was a way round.

Fines.—Agree with thine adversary quickly, was the text on which the Angevin kings built their popularity and their consequent revenue as dispensers of law. They took pains and

money to allow litigants to settle by their leave claims, whether for crimes committed, torts disputed, or contracts made, in the king's court as an end of legal proceedings often fictitious, in such a manner that the settlement was not only final, but on payment to the king bore the guarantee of legal finality as a written agreement embodying a final settlement of litigation enrolled in the king's court. This fining for leave to make a compromise not only avoided for the parties the great expense and risks of litigation, but it avoided for the king a settlement of crime out of court by which he might have lost revenue.

As examples from Ireland, Manazer Arzic pays 20 marks for having trial by writ of novel disseisin against Theobald Walter; but Theobald pays the king 80 marks that the trial may take place not in Ireland, but before the king in England. Richard Gille Michel pays 66 marks 2s. 3d. for permission to compound the appeal which Owen O'Brien had instituted against him for the death of his father (Oblata Rolls, 1 John). Affric de Curtun gives 30 oz. of gold for trial by twelve free and lawful men of a disseisin, and the justiciary is ordered to summon them to the next county court at Dublin (Oblata Rolls, 2 John).

The man advancing money to another got judgment beforehand for the amount of principal and interest; not but that he would have possibly to pay the king for a writ of debt if he had occasion to enforce his security.

These settlements out of court, as we should call them, forming by far the largest part of the litigation of the Middle Ages, rest for their effect on the prime characteristic of the new federal law system, the characteristic which distinguishes it from the equitable decision of the Irish or Manx Brehon or the proceedings of the Norse Things, and sets it above them in the eyes of the uneducated mass. The procedure of the court began with and rested throughout on written forms.

Written Records.—We may leave here for the moment compulsory procedure for crime, and turn as for better illustration of written procedure to the now antiquarian civil side of the king's courts, which was undoubtedly popular in spite of all its drawbacks. It is not that in the eyres the criminal side was not fully connected with writing. The priests or Brehons of Tacitus have long since ceased in southern England to be—as such—judges of life and property; but the ecclesiastic remained most prominent as a judge and scientific lawyer moulding law and procedure, and the king and the king's justices are accompanied by numerous clerks who put down in writing the essentials of the case as a record.

Maitland points out in the preface to the *Glouc. Pleas* that among the judges appointed at that assize were the abbots of Reading and Evesham, and Martin Pateshull an ecclesiastic dean of St Paul's, and one of the strongest

judges on the bench. Other notables were William of Raleigh, treasurer of Exeter, and Bracton, archdeacon of Barnstaple.

But it was in the civil cases, the disputes as to the ownership of land, trespass, feudal claims, contract, and so forth, that the written record blossomed into such magnificence.

It began, as all such things do, by methods adopted for convenience, and it became a mass of technical distinctions which would vie with the meticulousness of Hindoo literature, largely responsible for the departmental system under which at the present day a plethora of clerks make and pigeonhole minutes for the use of posterity.

I do not propose to go far into this system of civil procedure. Of great importance in the twelfth and up to the sixteenth centuries and later, it has ceased to be of any but antiquarian interest in our day. Then, unless the claimant paid the king for a jury, his remedy was by battle.

Procedure in all civil cases began by the issue of a writ of summons or command from the King's Chancery. The common forms of such writs may be seen by the following taken from Glanville's *Treatise on the Laws and Customs of England*:—

"The King to the Sheriff Health.—Put before me or my justices on such a day a suit which is in your County Court between A and N concerning one Hyde of land in such a vill, which the said A claims against the

aforesaid N as her reasonable dower. And summon by good summoners the aforesaid N, who holds the land, that he be then there with his plea. And have there, etc." (Bk. 6, c. 7.)

"The King to the Sheriff Health.—Command N that justly and without delay he cause A, who was the wife of E, to have her reasonable dower in such a vill, which she claims to have of the gift of the said E her husband, and of which she has no part, as she says; and of which she complains that he has unjustly deforced her; and unless he does so, summon him by good summoners that he be on such a day before us or our Justices to shew wherefore he has not done it; and have there, etc.; witness, etc." (Bk. 6, c. 15.)

"The King to the Sheriff Health.—Prohibit N that he holds not in his Court the Plea which is between M and R of the service of eight shillings and of one quart of honey and two stikes (?50) of eels, which the aforesaid M exacts of the aforesaid R for the yearly service of his free tenement that he holds of him, in such a vill, for which tenement the said R acknowledges that he owes him eight shillings a year for every service, unless the duel be waged between them, because R from whom the service is required puts himself upon my assize and prays a recognition whether he owes eight shillings a year for every service, and besides

one quart of honey and two stikes of eels; witness, etc." (Bk. 2, c. 9.)

"The King to the Sheriff Health.—I command you that you compel N that without delay he appear in the Court of I his lord, and there abide by the right concerning his free tenement that he hath encroached against him as he says lest (least), etc.; witness, etc." (Bk. 9, c. 12.)

Like all ancient procedure, such writs became extremely formal and technical. The claimant had to choose a special writ and abide by it. If he chose a wrong remedy the writ was quashed, unless it was allowed to be corrected during the sitting.[1]

There could be no better example of the difficulties of such choice, and of the elaboration of elaboration for inconvenience and mischief of the forms of action, than the example taken by P. and M.—the writ of entry.

We may make, they say, writ of entry, a genus of which (1) sur disseisin, (2) sur intrusion, (3) cui in vita, etc., are species, and so we make some twelve forms. Or, taking each of these species separately, we may divide it into many forms, since the writ may be (1) in

[1] From the Law and Usages of the City of Dublin, R.S., No. 53, "De Miskennyng": "E si vous volez sauer ke miskennyng est Jes le vous diray:—Si une home ad dit a baunk chose quil ne deust pas dire et ly semble qe sun counte nest past si bon come estre deust il que ceo soit puet recourer sun counte toutes les heures qe les baillifs seent en baunk et ne nye apres."

the per, (2) in the per and cui, (3) in the post; and again it may be (1) sine titulo, *i.e.* for the first person who was deprived of the land, (2) cum titulo for his heir; so that we get six forms within each species, and thus force up the number of forms of this one genus to seventy or eighty. Then if we distinguish between land and incorporeals, we may rapidly increase this total by permutation and combination.

It was surely far cheaper to pay the king to be allowed to agree, and to have the agreement recorded as a judgment.

Scotland and Wales.—Scotland in the thirteenth century follows England in her modes of procedure. The courts of the Scottish kings issue briefs or writs to the sheriffs commanding them to enforce the greater excommunication, to inquire into scab among sheep, to excuse merchants who had paid custom in England from paying again in Scotland, or to destroy weirs upon the river which prevent fair salmon-fishing. The same writs of prohibition testify to the same struggle between Church and king.

This English system was very gradually extended to Wales. Edward I. in 1280 enacted the Statutum Walliæ, regulating both criminal and civil procedure for the six counties of Anglesea, Caermarthen, Cardigan, Caernarvon, Flint, and Merioneth. The rest of Wales, with part of the English counties of Gloucester, Hereford, and Shropshire, were

left under the absolute jurisdiction of the lords marchers.

In 1535, and again in 1543, Henry VIII. by statute destroyed this jurisdiction of the lords marchers and created of their Welsh part the counties of Brecon, Denbigh, Monmouth, Montgomery, and Radnor.

The Scottish king followed the English example as far as his conditions would admit, greatly hindered by the excessive number of regalities and private jurisdictions held by landowners and hereditary officials. In Scotland, in the place of the judicial eyres, committees in parliament administered the law.

The Crown, not having the same power as in England, had a sterner struggle for supremacy in legal matters. A statute of 1369 (*Acts of Parl. of Scotl.*, vol. i.) ordains that no justiciar, sheriff, nor other officer of the king execute any mandate addressed to them under whatsoever seal, great or privy seal, small seal or signet, in prejudice of any party, if it be contrary to the statutes or the common form of law; and if any such mandate be presented to him (that is, any mandate contrary to the statutes or common form of law), he shall endorse it and return it immediately so endorsed—a provision which might be enforced if the king were not strong enough to ignore it. Up to 1747 the courts of regality confine the jurisdiction of the Crown in Scotland to few matters in criminal law.

Extension of the King's Federal Jurisdiction.—As the Romano-Anglic system was introduced into the other parts of the islands, all its salient features—the circuits, the presentation of offenders, the money payments for offences, the fines for leave to plead, the human verdicts of the jury—appear with it.

In 1315, Edward, claiming his rights over Scotland, placed the country south of the Forth and Clyde under justiciaries for Lothian and Galloway, and north of those rivers for the districts south of the Grampians and the Western Highlands, a proceeding which would hardly render his rule popular with the lords who, following that patriot lover of liberty the Norman baron Robert de Brus, had their profitable courts of regality inconsistent with Edward's authority (*Acts of Parl. of Scotl.*, vol. i. p. 120).

The same features follow the introduction of the system into Ireland. For example, Eth McCray O'Kennedy, charged with many trespasses against the king's peace, makes fine for 20 shillings saving death of Englishmen and arson (*Calendar of the Justiciary Rolls of Ireland*, 1295-1307, p. 3).

The Cantred of Offaly comes by twelve jurors. They present crimes, the obstruction of a road, misuse of power by officials, suggestion as to clearance of passes from obstacles (*P.C. Kildare*, 1297, 25–26 Edw. I.).

As an occasional example where the good sense and fellow-feeling of the community

overcome the desire of gain, the following:— John Martin, taken in possession of two goats which he had stolen, says that he did it from hunger alone. Jury find that he did it from hunger, and is not accustomed to steal. (Every now and then in the withered waste of mediæval life one comes upon some spring all brackish of human nature such as this.) The goats are worth 11d. Therefore for the soul of the king he is quit (*ibid.*, p. 5).

CHAPTER XI

THE ECCLESIASTICAL COURTS—SANCTUARY—THE CORONER

The jurisdiction of the county court contracts yearly before the extension of the king's peace and the advantages of the procedure by the king's writ in civil matters; the hundred court shrinks into an insignificant police of petty offences, controlled by or sold to the local landowner; but a great rival grows up to the king's judicial rights claiming a higher standard of morals, a wider equity, a less confined peace, the ecclesiastical court Christian, whose court of appeal was at Rome.

A struggle has long ago begun, obscured for us by the Norman Conquest of England by the pope's nominee—a struggle which reached its climax in the last half of the twelfth and first quarter of the thirteenth century over all Western Europe—between the law courts of the emperors and kings and the ecclesiastical courts. It is a struggle which ends only with the Reformation movement of the sixteenth century, if then, and has its effects even at the present day as an additional cause of disquiet in Ireland.

The court Christian, extending as one solid

organisation over Western Europe, had an immense jurisdiction of its own over matters which ever so remotely could be construed as relating to religion—over legitimacy, sexual offences, contracts confirmed by oath, wills and successions on death.

As an example, the following are the matters judged in the Archdeacon's Court of Chartres in 1405 (*Ecole des Chartes*, vol. xvii. 505):—"Voies de fait, 107; abstentions de communion, 38; adultere et concubinage, 28; commere avec des excommuniés, 12; injures et calumnies, 6; travail à des jours défendus, 17; négligence dans le service divin, 5; jeux interdits, 8; ouverture d'une auberge dans la maison presbytérale, 1; cas divers, 15—237 affairs qui ont produit 192 livres 15s. 6d. amendes." "Le passion du jeu était alors fort developpée, car on voit les accusés perdere leurs couvertures de lit leurs habits et jusqu'à leur chemise."

It was inevitable that, as the communal life decayed, this jurisdiction should increase and should come into conflict with the king's courts. The succession to the goods of a dead man rested on the proportion in which the kinsman was responsible for the blood payment; when the blood payment gave way to the trial for crime in the king's courts, the Church, as the connecting link between the communal system and the individual, assumed the disposition of the goods of the dead man.

They claimed much more and the lay courts admitted much less, a fight steadily going on

over a debatable ground of offences of a pecuniary value.

Chaucer in his account of the archdeacon's court, when he has run over sexual offences, witchcraft, defamation, wills, contracts, intestacy ("lahke of sacraments"), sums up the uncertain ground as "many another maner cryme which nedeth not rehersen at this tyme, of usure and symmonye also"; and he adds that the bishop's apparitor or summoner, his writ server, for "smale tythes and smal offringe he made the peple pitously to singe"; he makes the friar describe the hated summoner as "a runner up and down with mandements for fornicacioun." Of sexual offences the Church courts continue to have cognisance, except that the lay baron as Satan rebuking sin fines his women tenants for "being violated." Later the women are publicly whipped for the offence, and the man pays money to the Church, while those who have sheltered the woman who has sinned are punished by the Churches as backsliding Christians. "Robert Donalsoun and Margaret Masoun ar decernit to pay xls. for nocht reveling of the barne born in thair hous be Janet Masoun gottin in adulterie be Jhone Beatoun of Pitlochie, and als to mak publict humiliatioun" (*Registers of S. Andrews Kirk Session*, Scottish Hist. Soc., p. 796).

The light view taken of sexual offences against women now dates from the time when the women suffered public degradation, and the

sole punishment for the men was an ecclesiastical penance or its equivalent in money.

The jealousy prevents any effective combination of Church and lay courts for bringing about better conditions. When Henry III. appoints abbots as circuit judges, Grostete protests for fear that ecclesiastical cases might be brought under the common laws. Again and again he lays down that the rights of the clergy are not to be judged by laymen.

The Conflict between Lay and Church Courts.—This led to perpetual conflict and litigation between the ecclesiastic who owned or profited by a court and the layman in the same case. Neither party hesitated to represent as matters ecclesiastical or lay all those little things, sometimes ludicrous, sometimes pathetic, which were in their nature indifferent to either, sought only for their money value to the court owner.

For instance (*Som. Pl.*, No. 297), the county complains that the archdeacons and deans implead in court Christian all who go to a scotale, and there do harass them. Yet the archdeacon and deans may have had some glimmer of common decency on their side. A scotale or festale, says the editor of Y.B. 13 Edw. II., vol. v. (Selden Soc.), in the county of Kent at the time of our eyre was after this kind. The bailiff or sub-bailiff, who had or held the scotale, often began by stealing or extorting sheaves of corn from the men of the neighbourhood. From these he

brews his beer. and expects those from whose corn it has been brewed to come and drink it, and to pay for the drinking. If they do not he will manage to make it uncomfortable for them in one way or another.

That they were a real scandal we have the testimony of a great prelate above the sordid gains of a small court. Bishop Grostete, one of the boldest opposers of papal pretensions in the thirteenth century, issuing his injunctions against abuses in the Church, enumerates (Letters, R.S., vol. xxv. p. 72) as abuses needing reform:—scotales; various games; scandalous behaviour at vigils; funeral feasts; games in churches and churchyards; mothers and nurses overlaying their children; private marriages; parish processions; Easter offerings; refusal of the sacraments where a fee has not been paid.

To take another instance. In an action against a poor parson by an abbot for breaking fences and carrying off corn, the parson defends himself by the plea that it is within the limits of his parish and that the corn taken is his tithe; and his counsel demurs to the claim on the ground that tithes being spiritual things, severed from the lay chattel which could be treated of in the lay court, the matter ought to be tried in the spiritual courts (Y.B. 1–2 Edw. II., p. 36).

Whether in the right or in the wrong, the ecclesiastic, whether sompnour or friar, was always ready for litigation, and supplied a large proportion of the cases whether in the

king's or other courts. For instance, to take a single volume of the Rolls Series, Y.B. 16 Edw. III., vol. ii., about 30 per cent. of the cases are causes in which ecclesiastical bodies were involved.

Nor were they content with waiting for attack. The sompnour was assisted by spies and mischievous persons who encouraged litigants to seek the court Christian rather than the common knowledge of their neighbours. The Records of the Leet Jurisdiction of Norwich (Seld. Soc.) give ample evidence of this. Again and again in the borough courts men and women are impleaded and amerced as being "common touters" of the official corrector (apparently the bishop's commissary) and the dean (pp. 3, 53, 58, 71, etc.), or of impleading or drawing into the court Christian cases which ought to be tried in the king's court or in the court of the borough.

The court which claimed these rights as of things belonging to religion might well be a court belonging to an undesirable alien, as the English priory was not infrequently the cell of a French abbey (see Y.B. 17 Edw. III., 14, 18).

Many cases in the Year Books and Pleas of the Crown throw a light on the struggle between the Church and the king, between Henry and Becket, or John and Langton, or William the Lion and John Scott, as the Church asserts its right to the profits arising from crime.

In the greater part of the cases the "clerk" is a subdeacon or acolyte only (*S.P.C.*, 24, 78, 79). The criminal and poacher were not always of necessity monks or in holy orders. "Clerk" included nearly all educated men. The clerks claimed by the dean were as often as not subdeacons (see *S.P.C.*, 24, 76, 29). In a case in Y.B. Edw. II., vol. ii. p. 125, the office of a carrier of holy water was held to be a benefice. *S.P.C.*, p. 121, in 1220, a man charged with an assault in the park of Lord Warrenne resulting in death, who claims clergy, is an acolyte; *ibid.*, p. 122, the priest's sons appealed.

The Welsh clerk claims the same privilege. *A.L.W.*, Anom. v. ii. 92, says that if a scholar commit a theft and is degraded he is not also to be killed, since there ought not to be two punishments for one cause.

A case which is typical of many aspects of the mediæval administration of criminal justice is reported in the Northumberland Assize Rolls (Surtees, 88, p. 366). In 1272, Robert de Sautemarie, a clerk, with three others, attacks and kills a merchant. No inquest was held for two years. One of the assistants was allowed bail and was outlawed on suspicion. Another was sent to prison, but two clerks, a deacon and a chaplain, broke the prison and released him. They were prosecuted, but they and Robert Sautemarie plead clergy and are delivered over to the bishop of Durham. The jury inquire whether Robert

the clerk is a bigamist, but it appears that he had only been married to a widow.

So long as the king or chief only took a regulated fee for arbitration there was no incentive to invoke the competition of the Church for a settlement. But when the king or the owner of the private court began to take uncertain and immoderate payments for crime in the place of the kinsmen, there was encouragement to them to submit to and assist the Church courts. These would only impose a similar fee, or perhaps enforce a pleasant pilgrimage without risk of the hideous physical penalties or outlawry of the lay courts. The Church could prevent the claim being pressed too far, and would see that the offence was overlooked if the offender would vow a satisfactory act of penance, resulting in some advantage to the Church.

In the Orkneys, for instance, the proceeding of making a vow to St Magnus was to cast lots whether the vow should be to go south on a pilgrimage, or to set a slave free, or to give money to Earl Magnus's shrine. It generally ended in the money being given to the shrine.

The Orkney Church was not above applauding the timely murder of a disagreeable man. When in the middle of the twelfth century an Orkneyman had avenged the murder of his father by a cold-blooded slaying, he is brought by stealth to Bishop William of the Orkneys, who is told all the facts. The bishop is called

on to shelter him. He "thanked him for the slaying, and said that had been a cleansing of the land" (R.S., vol. 88, iii, 119).

As these payments were extended to apply to future offences, they helped to bring about the breach of the Reformation.

The question involved in all the twelfth- and thirteenth-century disputes between king and Church was not one of principle nor in any sense one of religion, but was, who was to have the goods and money of the only class that as a rule had any, the whole world of educated men.

There had been in Stephen's day a disputed claim between St William of York and Henry Murdac, who was the candidate of the Cistercians and of St Bernard and Rome. St William in 1153 was restored to the archbishopric of which he had been deprived. Osbert of Bayeux, who had been archdeacon to Murdac, poisoned St William in the eucharistic chalice, and claimed immunity as a clerk from the common law. Such a case doubtless helped to bring to a head the struggle with Rome.

The great ecclesiastics were not without the means of forcing men to the battle if they chose to use it, or to the ordeal before the pope decreed its abolition. The great ecclesiastics, like the great lay barons, had these rights of trial granted them, and no doubt in case of non-payment occasionally used them. Alexander I. grants the prior of Scone a juris-

diction "duello, ferro et fossa" (Sir A. C. Laurie's *Scottish Charters*, No. xlix.). The abbot of Scone had an island in the Tay granted to him for ordeals (Innes, *Legal Antiquities of Scotland*).

The Church baron was not averse sometimes to invoking the combat by himself or his champion. Jocelyn tells us of a combat at Bury during which the opponent of the abbey opportunely sees a vision of the saint and is vanquished; the abbot of Abingdon wins a case concerning lands (R.S., vol. i.) by means of his champion; Robert Wyville, bishop of Salisbury 1330–75, makes an offer which is refused to try by combat his right to the castle and chase of Sherborne with William of Montacute.

In the days of Henry II., Hugh de Puiset, bishop of Durham, and Roger de Pont l'Eveque, archbishop of York, were both good fighting men.

But in all ordinary cases Church penances to be compounded for by payment were the usual course.

The procedure of the Church courts, influenced by Roman law, was inquisitorial, the rules of evidence far more strict and scientific and enforced by torture, which in the less commercial countries such as Scotland remained for some time after it had become disused in England, or by excommunication, of which in Scotland the results were much more severe.

Among the provisions in *T.A.C.N.* relating to the Church are ch. 53, which names the pleas which relate to the Church as among those which belong to the duke; ch. 71, a provision made by Henry I. in 1135 that for killing or assault in time of Church truce and Church peace battle was to take place in the king's court, and nine livres of chattels of the vanquished was to be paid to the Church, "or he purges himself by the judgment of holy Church and makes amends of the bishops and me"; and ch. 72, the constitutions of Richard I., priests and clerks are not to be hung, clerks in prison are to be handed to the bishop, and those flying to the church or to the vestibule of the church are to abjure the realm within eight days or a time allowed.

Sanctuary.—This matter of sanctuary in the Church played a very important part in mediæval law. You may trace it in any country from the Mosaic laws onwards. It is at its best the protection of the weak and suffering, the man who has sinned or offended, against the angry pursuer.

Throughout all the early customary laws it was a privilege well defined of the chief and of the Church, the extent of the protection widening as the person who afforded it had the greater power. (*A.L. Ivel.*, i. 125, distraint of the chief for the fuidhir; Cnut, c. 28; Edw. Conf., c. 23; Wm. I., c. 48; *L.H.P.*, viii. 5, etc.)

It was safeguarded by heavy penalties for

anyone who broke it and seized men under its protection.

Sanctuary was open to great abuse, men flying to the church or to the borough as sanctuary, and there enjoying what they had wrongfully obtained.

It was abolished in England in the reign of James I. A very vivid account of its evils may be read in fiction in Scott's account of Alsatia in *The Fortunes of Nigel.*

The boroughs attempted to guard themselves against the incursions of these broken men, whom they probably could not wholly avoid. An order in Beverley in 1429 (Beverley, p. 20, Seld. Soc.) declares that no sanctuary man may be a burgess, or carry on him a knife or dagger except with blunted points, nor any club or sword.

The Coroner.—Sanctuary introduces us to a court not yet noticed—the Court of the Coroner.

The office of the coroner is supposed to date from the eyre of 1194, which only means that our first written notice of them dates from that time.

They were elected by the burgesses to attend to the pleas of the Crown and matters in which the Crown was interested, their chief duties being financial—to see that the king got his chattels of the dead man or the fugitive, and the treasure trove.

They represented the king, their jurisdiction as of him superseding that of any

local court or franchise when he was present. They were generally knights and large land-owners.

The abuses incidental to their office are pointed to in a prayer of the Commons in 25 Edw. III. (Roll Parl., ii. 229) that sheriffs, coroners, and escheators (our word "cheat") should be changed annually, "pur les outrages, charges, et extorsions q'il fount a people."

Magna Charta, c. 24, had previously deprived them of the power of holding pleas of the Crown.

The coroner conducted the preliminary proceedings, like a modern magistrate, without any writ in the county court. Then if the criminal had fled to sanctuary, and offered to abjure the realm, it was part of the coroner's duty to receive his confession, to administer to him the oath of abjuration, and to assign to him the port of embarkation from which, with a favourable wind, if he was not killed by his enemies on the way, as sometimes happened, he should leave the country. Suitably dressed, carrying a cross in his hand, and keeping strictly to the main road, he went directly to his assigned port, the coroner no doubt keeping an eye on him until he was out of the country, and seizing all his goods which the Church had not already taken, for the king.

But it was hardly likely in those early days that the kinsfolk would lightly forgo their pecuniary rights of vengeance, or allow the equable mercy of the Church and king to pass

unchallenged. Many an entry testifies to the dangers which attended the journey of the sanctuary man to his port of embarkation. Sel. Cor. Rolls (Seld. Soc.), p. 9, tells how a man who had fled to sanctuary, abjured the realm, and was on his way to Dover, was killed by the pursuers of the district; in another case, p. 37, he was beheaded "per villatam de Houghtone"; and again, p. 29, a band of men from Lincolnshire pursue a man whom they claim to be a felon to a house in Bedfordshire, where they assault him and cut off his head.

Part V: Local Government

CHAPTER XII

THE COURT OF THE CHIEF AND THE FRANCHISE COURTS

The eyres of uncertain interval gradually become the regular circuits of the king's justices; the court of the county is correspondingly deprived of its importance, both civil and criminal, until it finally becomes the county court of our day; the court of the hundred falls under the control of the local great man, the lord of some neighbouring barony or manor, and is merged in his jurisdiction as an associate of royal administration; more and more the working of the law, both as regards the greater offences and the settlement of disputes between great men as to land, becomes the province of the judges of the king's courts.

As this takes place the ecclesiastic, who might not have been unwilling to submit to the communal county court when the bishop as well as the earl, the spiritual as well as the lay authority, presided, claims his immunity as one of a privileged caste from the king's courts, in which the king's claims are substituted for those of the society; the court Christian becomes the aggressive and often successful rival and equitable supplement of all lay courts.

But other sources of administration and settlement of affairs by legal procedure had in the meanwhile increased and become prominent *pari passu* with the increase of the king's power; the courts of the chiefs, and in the parts influenced by Rome the franchise courts.

This was no new principle, but only a natural adaptation of conditions of the past. Each county has formerly represented an independent commonwealth; even when the king affected to control its affairs, he interfered only so far as matters were concerned with the breach of his peace, with the customary contributions to his income, or with those great disturbances or offences against society which from their local effects might lead to revolt or war or neglect of payments to the king.

The Courts of the Tribal Chiefs.—Under the communal society each chief had in the past enjoyed in England, and up to varying late times continued to enjoy in the rest of the islands, his own court, the tribunal of the sept or tribe of which he was head and chief kinsman. The common lord was essential for justice (*A.L.W.*, Anom. VIII. xi. 13; *A.L. Irel.*). Each head of a church community judged its own members. Heroes and heroines (*i.e.* the aristocracy) and the tuaitha (people of the tribal district) are governed by their flaith or chief. All the chieftain classes are governed by the law of the district (corus tuaitha, *A.L. Irel.*, iii. 15). These local authorities hear

and pass judgment on local cases according to local custom (*A.L. Irel.*, iv. 241–273), the attendance and criticism of the community being guarantee that the decision meets with local approbation.

In the clauses relating to land causes in *A.L.W.*, Anom. xi. i. 1, in the court of a cymwd or cantrev, "judicial judges by privilege of land like breyrs" or free heads of households are spoken of.

The Welsh, the Manx, the Norwegian chiefs continue for some centuries to administer this elementary justice; in the Western Highlands it continues until late in the eighteenth century; in Ireland the combination of court Christian and court communal still enforces its decrees by excommunication and cattle-driving in defiance of the king's writ.

As these tribal jurisdictions were destroyed or died of inanition or gave way before a new system which harmonised with the views of the community, they were replaced by the courts of local franchises.

The feudal baron, in fact, assumes the position of the chief of the group family or the tribe, with the advantage that as time goes on he is less and less restrained either by the ties of kinship or by the restrictions of custom.

The Franchise Courts.—These courts only differ from the older courts in that the men who enjoyed them held them as grantees of the Crown and not as kinsmen and chiefs of the people.

They only differ from our modern magistrates' courts in that the right of court once granted resulted in a separate jurisdiction, independent of and not responsible to the king's courts, except in the rare case of a special review for corruption or injustice done (see *T.A.C.N.*, ch. 30, and Glanville, bk. xii.). If a complainant wishes the king to risk interference with such local courts he must first of all buy a writ of the king for the purpose from the king's chancery directed to the owner, and he must show clearly that he is unable to get justice in his lord's court.

Imagine to yourselves in the British Islands of the present day the magisterial courts, the courts of the boroughs, recorders, and so forth, as valuable pecuniary privileges granted to the holders for money or for political services rendered or as a supplement to the weakness of the imperial arm.

That perpetual Defence of the Realm Acts were enacted by immemorial custom, enforced with every sort of local variation by each independent court, extending to the regulation of the smallest act or omission of social existence, from the warming up of cooked dishes [1] to the sale of stale fish.

That every presentment at such courts was made with the sole view of the pecuniary advantage of the court holder, and that all the

[1] Leet Jurisdiction of Norwich, p. 13 (Seld. Soc.), it is presented that all the cooks and pastry-makers warm up pastries and meat on the second and third days.

amercements imposed were regulated at the pleasure of the owner of the court only by the supposed capacity of the offender to pay them, and that they went to the owner or to his official personally.

That the same owner most jealously excluded the authority both of Church and king where custom or a construction of his grant enabled him to do so.

That he punished severely any litigant who had dared to take a case into another court of franchise,[1] or into any competitive court, fining severely any "common touter" who had encouraged the transfer of a dispute into the court Christian or into the king's court to the detriment of his pecuniary returns.

Imagine to yourself, in short, a society limited, not by any want of moral sense, for they were disciplined to moral and religious instincts which we lack, but by rate of transit and difficulty of communication, which forbade effective action from the overlord except in great and urgent cases, forcing the community or its chief to delegate to local authority, to the local chief, to the lay lord, to the borough magistrate, to the abbot and the archdeacon, an absolute rule and a rule which is a profit *à prendre*.

An Example from History.—As an illustra-

[1] Ralph, brother of Thomas de Hopton, to be attached for arresting a person within the earl of Surrey's liberty by night and taking him to the earl of Lincoln's liberty (Rolls of Wakefield Manor, ii. 2).

tion of the greater of these jurisdictions, when Richard I. sold everything in sight, from a bishopric to a leet court, borrowed all the money to be got, and went on his roving expedition to the East, he left John in absolute possession of about a third of England, with other castles dotted about all over the country; Hugh, bishop of Durham, had bought the jurisdiction over the territory from the Humber to Scotland, which brings him in constant conflict with the jurisdiction of Geoffrey, archbishop of York; many other great barons such as the bishop of Ely, the earl of Chester, and the abbot of St Edmunds Bury, have large areas of their own profit exempt from the king's authority.

But these are only the larger exemptions. Within them and around them the country is covered with a conflict of tiny jurisdictions—manorial courts over large and small areas, courts Christian of all sorts, forest courts of the Crown's grantees, courts of boroughs to which charters had been granted by the king or his barons lay and clerical, and many others.

The confusion of jurisdictions between the conflicting rights of the king's sheriffs and officials, the lord to whom the hundred court had been granted, and the abbot lord of a manor within the hundred, is well shown in a case of John de Stonore and the abbot of Buckfastleigh in Y.B. 20 Edw. III., vol. i. pp. 236–256.

In 1154 almost every little village was a complete world, spiritual and commercial. It had no need of outside converse. It worked and produced not for sale but for itself only; it had no use for commerce except to supplement its own needs where its own effort failed; it had no freedom of thought of any kind, and sought for none; its freedom of action was limited by unvarying custom; its disputes were settled by its local law. Change and decay only came with changed conditions of agriculture, extension of commerce, and the gradual destruction of conventual life.

The system is with us to-day, except that the courts are no longer proprietary offices of value.

It is an aspect of society of the utmost importance for historical proportion.

The Good and Evil of the Local Court.—In these tiny units of national life the vast majority of human affairs were disposed of by these little courts of franchise, to which no provision in any charter providing for trial by peers could apply.

If there had been any such provision, no opportunity could have existed of enforcing it; the force of local pressure was and is the only remedy for local injustice. The holder of the court and the persons whose causes came before him were so closely connected in all daily toil, that glaring injustice could be made to recoil by many little methods on the owner of the court.

Such a system works well so long as the small court is not used by the federal government for political ends, and that in the Middle Ages was for the most part impossible owing to the jealousy of interference felt by the owner of the local courts.

On the other hand, the opportunities for bribery and falsification in order to draw cases into court were very great, appealing to the greed of the officials both lay and clerical. Probably the Friar's Tale in Chaucer is not wholly without some analogy of fact; Henryson's account of the consistorial court given in his *Moral Fables* (Maitland Club, xv.) is very possible; the official, both judge and officer, was paid in a way which encouraged corruption; Justice Heugham's fee in 13 Edw. I. is 30 marks, and Bracton's salary at an earlier date £50; judging by the remission of fines in the Norwich Leet Book, bribery for forgiveness of sins *may* have played a part. It is much to the credit of the men of the law that under such conditions justice appears on the whole to have been honestly administered.

The king's legal authority was restricted to the ground not covered by these courts, there being always a brisk skirmish going on, on the borders especially, with the Church courts (see Glanville, bk. iv. c. 6–14).

The whole struggle between Henry II. or John and their barons rests on these conditions, namely, that the king's court was in the first instance only a court for the transaction of

his own business, regal and feudal, just like any baron's court.

When Henry gradually extended the purview of his justices' powers by the regulation of the extraordinary county courts or eyres, and at the same time, while selling the hundred courts to great lords, took money to allow private persons to plead in his court, he drew business from his barons' courts and hurt them financially.

They revolted against him twice, the second time with success; Richard carried them off to the East and left the kingdom behind him in chaos.

John, coming to a bankrupt throne, got on well enough so long as he could draw money from the Church and Jews, but is met with a general revolt of barons lay and clerical when he attempts to enforce on them his father's system of law.

The result of the chaos in John's time was that the barons, both lay and ecclesiastical, recovered to a great extent in Henry III.'s time the legal powers taken from them by Henry and John. When Edward came back from the Crusade, following in the footsteps of his grandfather, he took steps to check this evil. He issued commissions of inquiry, followed by the Statute of Gloucester in 1278, and the Rotuli Hundredorum, which laid the burden of proof on the holders of courts to show their titles to their rights of jurisdiction.

The impression, says Fitzjames Stephen

(*Hist. of Criminal Law*, vol. i. p. 128), conveyed by the Hundred Rolls was that usurpation of franchises had gone to an extraordinary length. The country was full of private gallows. The courts were farmed out to bailiffs and stewards, who profited by exorbitant fines.

But Edward's attempts to check the evil were only partially successful, met always by the countercheck of the barons and churchmen with their henchmen refusing in the name of liberty to grant the money necessary to carry out the reforms. These inquiries showed that very many of the lords had no authority from the Crown any more than from the people for the jurisdiction which they enjoyed.

A well-known instance, frequently quoted in our histories of England, of one of these defenders of public liberty is that of the earl of Warenne, who, when asked for his title to his pecuniary profit, replied by drawing his sword.

The Lords of Regality.—South-eastern Scotland, to an even greater extent than England, lay under these divided jurisdictions, as the formation of the country rendered communication more difficult, and the central government, between the two hostile neighbours, Norway and England, was proportionately weaker.

Here the great officers of the more remote districts, such as the Marmoers (? Maermors) or Mayors of Moray, Buchan, Mearns, Mar, and Angus, presided over districts far more remote, over a people far more independent and more

difficult to control than the Anglo-French barons of Henry and John. And they had far less to lose by revolt.

As a consequence, not only did the franchise courts in Scotland show a more uninterrupted and direct descent from the court of the tribal chief, not only did they continue to exercise unimpaired powers until a very much later date, but their jurisdiction as far exceeded the liberties of the English franchise as the powers of the High Court of our day excel those of the Court of Petty Sessions.

The jurisdiction, says Erskine (*Institutes*, book i., tit. 4, sect. 8), of a lord of regality was in all respects equal to that of a sheriff; but his criminal was truly royal; for he might have judged in the four pleas of the Crown (robbery, rape, murder, and wilful fire-raising), whereas the sheriff was competent to none of them but murder. He had all the powers of the justiciary except over treason, and if a person residing in his locality was arrested and brought before the justiciary the lord of regality could reclaim him.

After the Reformation in Scotland these powers were taken from the Church regalities and their jurisdiction transferred to the Crown, but the lay courts continued to exercise them until 20 Geo. II., c. 43, after the '45.

An account of one of these courts is noted in the *Third Report of the Hist. Comm.*, p. 410—the barony court of Langfergrund, held by Sir Patrick Gray in 1385. It was

held on a moot-hill termed the hindhil of Langfergrund.

The sergeants summoned the tenants, who appear to have been persons of high position and large property, to appear. The question at issue appears to have been the title to land.

They did not appear. The court decreed by the mouth of the deemster that the sergeant should levy a distraint of the value of six cows for each one not appearing. A second and third courts were held with the same result. At the fourth court, one party, Sir Thomas Hay, appeared, and admitted that he had no charter and did not know by what title he held his share of lands. A delay of fifteen days was granted, after which at the final court Sir Patrick, by the mouth of his deemster, in the presence of all his nobles and of his court, decrees that the lands should remain in his own hands.

No doubt such extreme power of the great baron could easily be paralleled in England in early days ; it was always a matter of bargain and sale, and of the convenience and profit of the Crown. But such jurisdictions in England were not only more easily controlled by the king, but gave way far earlier before the federal power and the necessities of commerce. We have one example showing such a private jurisdiction in the dispute between Odo of Bayeux and Lanfranc of Canterbury adjudged at the fólk-moot held on Pennenden Heath in Kent in 1072. The entire exclusion of the

king's authority from the lands held by Canterbury was shown, except that the king could take penalties for offences committed on his highway—for acts of violence if caught in the act, or for digging in the highway (which would not be unusual if one wanted sand for mortar), or for felling a tree across the road. But this instance of a jurisdiction greater in many respects than that of the English king himself does not derogate from the extraordinary powers of the ordinary court baron of Scotland as compared with the ordinary court baron of England. England, prostrate under the drums and tramplings of four conquests, passed more early and more easily to modern ways.

As an instance, Innes in his *Scottish Legal Antiquities* instances a charter of David II. to Sir John Heris of lands in Dumfriesshire, in which it is expressed that there was no road through the barony except one lengthwise and one broadwise. The king's officers, if they passed through the barony with a robber in custody, must stop for the night, and hand the robber over to the men of the barony for the night; the king's officer could only do his office in the barony after showing his warrant to the chief at his house, and should have no power to search without good suspicion; and the men of the barony should not be liable for purveyance except for the king while he passed through the barony—and then at a fixed price.

The Scottish kings made efforts by proclamation and by force of arms to control and to reduce the power of their great nobles, so far as the enmity of the English king in the south and of the Scandinavian settlements in the north and the Irish Scandinavians in the west permitted them sufficient peace to gather strength.

William the Lion took measures equally vigorous with those of his contemporary John to check the encroachments of the franchise courts. His statutes provide that when the king comes into a sheriffdom the judges of that sheriffdom shall come to him and follow him until he leaves the sheriffdom, and that "no baron have leyff to hald court of lyf and lym, as of judgment of bataille or of watir or of het yon, bot gyf the scheriff or his serjand be thereat, to see gif justice be truly kepit as it aw to be." A statute of Alexander II., 1230, seems to replace this ordeal of water and hot iron with inquiry by a jury.

But the king's statutes equally acknowledged the rights of the barons' regalities. Thieves were to be brought to the prison of the baron in whose barony they are caught, and the baron is to have their escheat (*Leg. Malc.*, c. 9). No one may pursue a thief or stolen cattle with hounds on the lands of another lord without his consent. But if they get such consent and catch him with the value of 15d. on him, they may hang him (*Reg. Maj.*, c. 28 ; *Acts of Parl. of Scotl.*, i. 637).

A reference to the French records will show very much the same condition of affairs. Pierre de Fontaines (xxxi. 4) gives us: "Li sires qui a le Rat et le meurdre en ses Fiés et en son demaine et a le plait de ses homes s'il en sunt apelé puis k'il sunt si coukant et si levant û tans d'apel" (and *ibid.*, xxxi. 2, *Établiss. de S. Louis*, xxvi.).

The owner of the court, whether great or small, had to live and let live. He not only felt the pulse of the patient from time to time to make sure that he was not drawing too much blood, but he divided his profits with the retailer who held the court for him.

In the English courts of the county and hundred, the king, unless he had sold his rights out and out to a sheriff or other great man, divided with the earl, in proportion of 2d. to 1d., the fees for business of all kinds.

As an instance for Scotland, the abbey of Kelso (Kelso Chartularies, No. 109, p. 80), when farming out their rights of jurisdiction to a tenant, provided "si sanguis effusus fuerit in terra ejus, ipse foris factum habebit de hominibus suis et nos de hominibus nostris."

The mediæval king who lived on perquisites, and in imitation the franchise-holder, was only too willing as a rule to sell justice as a matter of bargain and sale to anyone, lay or clerical, who would pay him for it, or to share the proceeds of the court with the man who did the work or with his clerk. Every franchise

was a partnership between king and chief for the partition of profits.

To give examples from Ireland[1] (Oblata Rolls, 2 John). The king appoints Meyler Fitz Henry as justiciary, reserving all pleas of the Crown. The king orders that no outlawry be made in any court of Ireland but his own. Close Rolls, 4 Hen. III., grants permission to the citizens of Dublin that Fitz Henry, their debtor, may be distrained according to the custom of Ireland.

The matters dealt with by these local courts were of the most varied character, as the courts themselves were the franchises of the great ecclesiastics, the chartered jurisdictions of boroughs, and the so-called manorial courts.

The Manor.—Manor at the present day generally means the big house of a village which with the adjoining lands has been purchased by some city captain of industry. What it meant when the term was occasionally used in the twelfth century would seem, by the opinion of experts, to be uncertain.

Our record, says Maitland (*Domesday Book and Beyond*), seems to assume that every holding either is a manor or forms part of a manor. He thinks manor a taxable unit. "Manerium, a house against which geld can be charged and where it can be collected."

The lord, he says, was probably offered some advantage if he would collect. I should think so. Imagine yourself trying to collect

[1] These are taken from Lynch's *Legal Institutions.*

geld from a man who had a wooden shed-house worth 3d., half a dozen pigs, not ringed, running in the woods, a hatchet and an iron pot, and a cow on the range. "For one reason, the king can easily tax the rich; for another, he cannot easily tax the poor: so he gets at the poor through the rich"—a sentence (written in 1897) which I recommend to persons puzzled by Mr George's Insurance Acts. You must either pay rates yourself or the landlord must pay them. The lord would be glad to pay the king's customary exactions to prevent any interference by the sheriff with his rights of justice.

Vinogradoff (*English Society in the Eleventh Century*) defines manor or mansion as a district of which the central house is the hall. "A certain quantity of land was organised as a compact estate with its separate administration, its distinct income, and distinct accounts."

P. and M., i. 596, say in the thirteenth century the term "manerium" seems to have been no more precise than the term "estate" (as commonly used by laymen) is at the present day. "To ask for a definition of a manor is to ask for what cannot be given."

But the authors describe the typical manor as identical with the township, the lord being lord of both. They divide the inhabited and cultivated lands of the manor into three parts —the land in demesne (land in hand), lands held by freehold (yeoman farms), and lands held by unfree tenure. There is also, they

say, pasture land. But they entirely ignore the item on which all cultivation depends—the waste, that vast area which falls later into individual ownership, and remains unimproved to this day.

Other definitions which may be quoted are:—

Elton, *Custom and Tenant Right*: "Manor, a district in which the lord has jurisdiction over his tenants and where he held a court, and where he owns all the lands to which no one else in the district can make a satisfactory title (*i.e.* the waste)."

Wiltshire Domesday: (Jones) "Manor, primarily the place of residence, 'a manendo,' but with a covering meaning of seignory or lordship." And see Archdeacon Hale's *Introduction to the Domesday of St Paul's*; *Special Pleas in the Manorial Courts*, Maitland (Seld. Soc.); *The Court Baron* (Seld. Soc.); Maitland's *Domesday Book and Beyond*; Vinogradoff, *The Growth of the Manor* and *English Society in the Eleventh Century*; and P. and M., *History of English Law.*

Mr Elton further remarks that manors are called districts when speaking of the tenants, townships when we regard the inhabitants, parishes in matters ecclesiastical. The township had no court *per se*, and no legal jurisdiction. It rested in the hundred court, and there would be a tendency to merge in a manor if the lord of the manor became lord of the hundred court.

But the members of the township might be under different lords, and only connected by their agricultural interests. The intercommoning of vills, the right of the cattle of both to range over the unenclosed waste belonging to both, the right of cattle of one owner levant and couchant on certain land to graze on other lands, is a frequent subject of litigation in the Year Books. (See a remark of Stonore J. in Y.B. 18 Edw. III., 402.)

In an action of replevin (Y.B. 14–15 Edw. III., 320) counsel urges: "You have avowed for suit to the court of your manor, which is a place uncertain, for a manor may extend into divers vills and into divers counties."

So long as the land was unenclosed without an ordnance survey, no definition of any historian or antiquarian could prevent the different communities from combining for the common convenience.

All that can be safely said about the manor is that it was very probably a former tribal division generally identical with the township or vill, and that it was the unit for fiscal and agricultural purposes.

It was an area of land of varying size, in some cases enormous, in some very small; *e.g.*, Yorks. Domesday: *Fridaythorp*, land to half a plough—one carucate. *Sherbury*, in the whole manner 350 acres of meadow, wood pasture eight miles long and three miles broad, and coppice wood four miles long and one broad. Champaign ground five miles long

and two broad and one quarenten. D.B., 302*a*, 2: There are two churches and two priests with one bordar having one plough.

It was held in military tenure by a lord, in whom the land vested, carrying with it an array of rights, duties, and liabilities, and a private customary court of limited jurisdiction, dealing with the numerous matters which occurred in the workings of a communal farming system, apart from any questions which were dealt with by the court of the hundred.

The Free Suitor.—Every manor must have had a certain number of freemen attached to it, to give their opinions or decisions on the causes arising (*e.g.*, the manor of Carlington, Domesday Book, ii. 233*b*, fourteen freemen were delivered from one manor to another *ad perficiendum* this manor. Maitland, *Domesday Book and Beyond*, p. 128; and see D.B., 193*b*, and Assize of King David, ch. 4). The freeman, says Bracton, was only bound to attend court for certain important matters such as trial of a thief or the king's peace.

Just as the Irish or Welsh chief or Orkney earl judged matters of dispute between himself and members of his community, the lord of the manor through his deputy judged all matters, whether of tort or contract, arising out of the complications of the social and agricultural life of his district, whether settlement of difficulties arising in the course of the common cultivation, matters of offence between two neighbours likely to produce

bloodshed, or, what was infinitely more important, offences against himself.

The manorial court, in fact, was simply the counterpart in the feudal system of the tribal authority of the sub-king or chief in the rest of the islands, adapted to an imitation of the royal court.

The most considerable accession to the power of the lord of the manor came, not from his fighting capacity, but from his position as chief, and as delegate, by grant or as purchaser from the king, of the hundred court, of the power and profits of legal administration.

Although the lord took the profits of the court, the judgment, while in essence it might be his, was not delivered as his but as the judgment of the suitors, the freemen who owed suit to the manor, one of whose imperative duties it was to attend the lord's court.

It is difficult to see how under such conditions any serious injustice could have been done to any freeman, as the interests of all parties were too much alike and too closely interwoven for real injustice not to act as a boomerang.

No doubt there was a good deal of irksome amercement for little breaches of common custom and neglect of farming duties, but every freeman had an interest in enforcing the common rules.

Someone must manage the farming opera-

tions, which varied enormously according to local custom (Glanville, bk. xii. ch. 6). It is very unlikely that anyone appealed to the king's court on such matters.

It is only when the lords begin, under the weak kingship of a minor after John's death, to seize the waste by approvement, that the freeman was really aggrieved by the proceedings in the lord's court in respect of his land.

He had at least an appeal to the king's court for redress, if he were strong enough to dare it. But only if he can show that he cannot have right in his lord's court (Glanville, bk. xii. chs. 6 and 7; Y.B. 32 Edw. I., 340, 360; *S.P.C.*, p. 99; *T.A.C.N.*, ch. 30).

The Unfree Man.—But the unfree man stood on a very different footing.

Under the tribal customs of all parts the chief or king would seem to have been judge wholly in any question which arose between him and the unfree members of the tribe, and, as he could control the judge or brehon, in all matters practically between himself and the freemen.

Senchus Mor, *A.L. Irel.*, vol. ii., Law of Social Connections, p. 343: "The chief can pronounce judgment, proof, and witness upon his daer tenants," the villein class, but the "saer stock tenants," the freemen, "can oppose them and witness against them"; and the same is given as true of the Church. If the chief made a partial judgment in his own favour, there was no remedy any further than

there is any at the present day, except the belief in the avenging power of God, and later in vengeance which may result from public opinion. If a false decision is made, blotches came on the king's cheeks; the Senchus Mor refuses "dire fine" to a false-judging king, described as one who "pronounces" false sentences on his vassals, whether it be concerning a small thing or a large, encouraging, it would seem, rebellion for small matters. It is quite possible that Dermot had offended against public opinion in this respect, and so found himself unsafe in Leinster.

The lords of manors or franchises, whether in England, Scotland, or France, succeeding to the powers of tribal chiefs, occupied the same position of local judge.

The unfree men were expressly excluded from serving on juries by 13 Edw. I., ch. 28, and 21 Edw. I., st. 1.

The unfree man could not appeal from the decision of the tribal chief, nor could he appeal his manorial lord before the king's justices (*L.H.P.*, xxxii. 2). Any remedy he had lay in the court of the chief or of the manor. If he had had an appeal to the king's court, it is very hard to see how he could succeed as against a powerful man.

There must have been a considerable force of public opinion among the free tenants who were the suitors in the lord's court, to prevent any very violent oppression of the unfree. No doubt the necessity of their existence for the

agricultural operations acted as a check. But except for such checks the unfree man would appear everywhere to have been at the mercy of his lord.

Possibly the lord was not liked. The man who manages and organises seldom is. But I doubt that in most cases the verdict passed upon him, as upon the mediæval king, would be that which the schoolboy is said to have given of the good headmaster: of course he was a beast, but at least he was a just beast.

The freeman might need the assistance of the unfree man in common labour, and he would have a fellow-feeling for him as against his lord.

The Growth of Franchises.—It was much to the advantage of the king, who had far too much on hand to attend to local matters, that, so far only as his jurisdiction did not reach, it should be sold to military men of influence for a price to be paid to him, rather than remain to the benefit of the community by means of the independent and not always loyal tribunals of the county or hundred.

The chief essence of the manorial arrangement was fiscal, whether it was collection of feudal dues or amercements for faults. The king could not and would not try to collect from all the small people (such as the *liberi homines* of the eastern coast) the feudal dues or the amercements of the local courts.

In the place of the head of the family or of the sept, the lord of the manor the manager

of the common agriculture, was made responsible for these to the State, and as a result responsible for the torts of his tenants or of the independent freemen. He was the link between the community and the king. He collected the fines of the court as he collected the feudal dues, and farmed one or both from the king. In course of time this came to be regarded as a grant from the king, the fountain of all justice.

When the lords gradually extended their jurisdiction, filching authority both from the king and the county courts, a conflict of authority and pecuniary profits results. They claim *sua jura* (Hoveden).

In the first instance, the grants of land being held for personal service implied that the tenant could not part with the land. But as the son of a man naturally succeeded him in the land, and commerce brought with it greater freedom of user and sale, the practice arose by degrees of "subinfeudation," selling the lands by way of perpetual lease subject to performance and payment by the grantee of the services and rents reserved. This was carried in the time of Henry III. to a very great extent, the manors being subdivided among many grantees.

Without going into the legal questions which arose, it is sufficient to say that a manorial court jurisdiction, which was sensible enough when the manors were as a rule substantial areas under the jurisdiction of some

great man, became mischievous and dangerous when every little holder claimed as his financial right that he should have his little court where poor men could be convicted and fined.

When to remedy this abuse, which largely affected his revenues, Edward I. in 1290 issued writs of *Quo warranto*, calling for an evidence of a grant from the Crown, he allowed such private jurisdictions to remain as could show continuous seisin before the coronation of Richard I. The many lords who could not produce such a grant fell back on immemorial custom, just as in the eighteenth century the Highland chiefs had either to manufacture pedigrees connecting them with feudal lords, or to fall back in the same way on the customs of their tribes, which had been almost forgotten by themselves and were wholly unknown to the men who were their adversaries and wanted their lands.

It will not do to leave this part of the subject under the impression that the substitution of the courts and judges of the king for the arbitration of the Brehon at the instance of the kinsfolk led either to willing acquiescence in the law or to its successful enforcement. From the time of Henry II. onwards there is a never-ceasing stream of attempts, generally unsuccessful, to support the courts in their enforcement of the law, and at the same time to check the corruption of officials of all descriptions and the partialities of the local juries. Judging from all the public records

which bear upon this subject, and the private records such as the Paston letters, the attempts were on the whole entirely unsuccessful. The general condition of England under royal justice at a later time, in 1348, is set forth by Mr Pike in the introduction to the last of the Year Books, published in the Rolls Series.

In fact, society had no longer any interest in checking crime. Human nature resisted the pitchfork, and was only driven out from time to time by the outside force which goes by the name of the strong arm of the law. But the men who suffered under such a system were intent on forcing it upon the neighbouring people, and looked on those who wished to follow what the invader called their "wicked and mischievous customs" as an inferior people to be dragooned to enjoy and love the higher law.

CHAPTER XIII

THE JURISDICTION OF THE FRANCHISE COURTS

In the communal parts in Western Scotland, in Man, in Ireland, in Wales, wherever the community as an entity had any power, the chiefs in their group circles presided over the decisions of the freemen, who adjudged all matters large and small according to the local tariff. But where the federal authority has succeeded to the communal assembly, the full powers of the community over its members, which have passed, where the federal power was sufficiently strong to enforce them, to the king alone, are exercised over the inhabitants of their so-called liberties, imitating in every respect the practice of the court of the federal king, by the lords of the greater franchises, in the courts of regality of Scotland, or of such great barons lay and churchly in England as have the right to behead, hang, and drown offenders, imprison enemies and debtors or creditors in their castles—to exercise, in fact, regal power. These men were kings in their franchises.

Their vassals were their suitors, their judges, and later their jurors; the gallows, where a

man had nothing, or where the transition from the community to the individual had proceeded so far that his goods or his land could be seized by his lord on conviction, was in pretty frequent use.

For instance, in the Records of the Regality Court of Spyne (Spalding Club, vol. ii.) in 1592, "ane common thiefe" (p. 127) "was convict and ordaint to be hangit to the deid, quhair-upone dome was giffin"; a man and his wife for theft (p. 130) were ordained to be "taken to Lossye and their to be drownit quhill they be deid"; while in a case of murder, possibly because the gallows needed repair, the slayer (p. 131) was ordered to be beheaded.

Apart from these great and to a certain extent exceptional jurisdictions of life and property, all social life was under the purview of the franchise courts, which had cognisance of matters of the most various character, covering the whole ground of local life which, except for feudal duties or occasional federal police regulations such as the assize of bread and ale, was untouched by the distant and much-dreaded authority of the king.

The matters regulated in the borough franchise courts only differ from those of the country manor in concerning themselves with a lesser number of agricultural duties and a greater proportion of breaches of social relationship and questions relating to trade.

The Variety of Matter Dealt With.—All questions which might arise in a small self-

contained society were disposed of in these local courts: acts of petty violence or of petty slander, nuisance, trespass and theft, breaches of borough bylaws or of manorial custom or of agricultural routine. The lord claims some control of the morals at least of the women, he watches the observance of township and police duties, he decides questions of land title and easements among members of the society. Men and women are fined for blasphemy and foul language, fighting and getting drunk. The barony court of Stitchill makes a declaration that none within the barony drink excessively nor be sensibly drunk, nor use filthy nor scurrilous speeches, nor mock at piety.

In every case the proceedings furnish amercements which go to the profit of the lord. It would not seem that in this respect there had been any change from the arbitration of the chief who took his fee in tribal times, except that the amount of the fee was unregulated by the custom and by the opinion of the community; and even here I am inclined to think that the personal power of the lord has been much exaggerated and the communal power of the freemen too much ignored.

The lord was greatly dependent, at least in early days, for his food and his revenue on the produce of his lands, and he could not afford to press too hardly on men who could pay him back by shirking farm work or doing it badly,

or by letting his cattle into his garden or stealing his thorns.

The danger of oppression came in later days when there was no such community of interest between the chief or lord and the people whose social state he regulated; when the farmer at a commercial rent had taken the place of the freeman or villein paying his customary dues; and later still when the magistrate, imposing heavy fines for offences often only technical, on police representation, was himself a mere placeman of another social class, ignorant of the communal conditions which he was supposed to be regulating.

Manorial Agriculture.—Among the matters disposed of in the franchise courts agriculture and manorial customary duties take the first place.

A typical case is one (S.P. Man., 19) where all the ploughmen of Great Ogbourne, Wilts, are convicted by the oath of twelve men because by reason of their default the land of the lord was ill ploughed, and Walter the reaper is in mercy for concealing the said ill ploughing.

Persons are fined for bad mowing, for using the lord's plough without licence, for pasturing more beasts on the common pasture than they had land to justify, for damage of all kinds done by stock of all kinds—horses, cattle, and pigs—to others' crops.

A whole township is fined for not coming to wash the lord's sheep, and another for having elected a common reaper and not

presenting him to the bailiff for his approval, for which the bailiff would expect a tip.

The whole vill advise as to the reeve to be appointed and men to take special positions in looking after the lord's sheep, and the vill answers as a body for them as pledges.

At the bishop of Ely's court (Court Baron, 128) the brethren of the hospital are presented for pasturing their sheep in autumn before the gleaners, against the bylaw.

In the Norwich Leet courts the prioresse and another are presented as making feed of the herbage in the city ditches and having pigs and sheep there, and of ploughing up the king's highway.

The court compels the members of the society to accept the offices to which they are chosen, or to pay for being excused. The lord's reeve gives the lord money for leave to quit the office of reeve, and the hayward to be excused the office of hayward. At the manor of the abbot of Ramsay in 1278, William of Barnwell wrongfully alleges himself free (*S.P.C.*, 94), and therefore refuses to be one of the jurors, whereas in truth he ought to pay merchet at the lord's will, when he wishes to give his daughter in marriage.

In Y.B. 1 and 2 Edw. II., p. 11 (1308), there is a case where a freeman of London, incautiously revisiting his birthplace, is seized as a villein on the alleged ground that he had refused the office of reeve.

Trespass and Theft.—The variety of little

things, whether customary payments, breach of customary duties, or petty trespasses and thefts, for which the lord obtained a fee, gives us a very curious insight into social life.

The reaping reeve (Court Baron, 123, 10 Edw. II.) took gleanings wrongfully acquired by trespasses, and threshed them for his own benefit; the hayward is accused of taking money from a bondman on the false plea that he was elected to serve the king in Scotland, and of taking joy rides to Ely on the lord's horses.

The system of court fees, the selling of justice, the lovedays for arranging a compromise, the fining for a settlement, the payments for a jury, the appeal from one jury to another—all those things which the Church and the barons sought to deny to John—run through all the records.

Men pay for licence from the lord for nearly every necessary act of life. The freeman may mow the sedge in the fens or dig the peats from the moors; but he must pay a fee for the lord's leave before he can sell it (Court Baron, 145). He must have a licence to marry or to give his daughter in marriage, to put his son to school or set him to a craft, to have a jury (2d.), to succeed in his case when he has a jury (5s.), for licence to hold land demised, to be put in seisin of his father's tenement, to be received into a tithing, for aid to levy a judgment debt.

Having a net contrary to the assize (N.L., 3);

poaching—the brethren of the hospital have two dogs which run in the lord's warren which give rise to suspicion (bishop of Ely's court, C.B., 128), John Swineherd has a dog which ate a rabbit of the lord's, and a dog of the vicar often chases hares in the field; having a handmill to the nuisance of the lord's mill, or having millstones in the house and paying no toll, or, as it is sometimes called, not making suit to the lord's mill, or taking toll oneself; habitually collecting bitterns and exporting them out of the fen (C.B., 126); setting up fences on the lord's land or encroaching on his unfenced land; not doing what was bidden on the lord's behalf; holding land while not in a tithing so that no one would be responsible for him in frankpledge;—men pay for all these things.

The lord takes pay for all sorts of little trespasses and thefts of common property: stealing the lord's wood, his kale, his peats, his corn, his nuts, his peas, the deer from his park, the fish from his pond, the stubble from his field, the fruit from his garden—"lowping the gairdine dyik," the garden wall, is a fairly common offence. To be in mercy for the lord's wood was very common, or for the carrying off of thorns. Men are fined for cutting off turf to mix with manure, for stealing roots and grass.

The borough and ecclesiastical courts as a rule look more seriously on these little mischances, as the borough is more crowded and

the opportunity of escape is greater. People suspected of petty theft (N.L., 121–3) are to be removed from the vill, though it is not easy to see where they are to go.

The varieties of theft and the penalties inflicted are many. Beatrix White and Alicia her partner are wont to pull the fleeces of sheep. The inquest finds that William Fowler committed trespasses on Walter Albin and carried off his goods and chattels from his house on various occasions by the consent of Walter's wife, which consent he obtained by frequently kicking her, to the damage of the said Walter, and he is fined 13s. 4d.; while John Francis for stealing a horse and carrying it fourteen miles is fined 6s. 8d. Probably the court took the twenty-eight mile ride into count.

If a man were not a thief he must be careful not to be suspected of being a thief. The jury of the Norwich Leet present Henry de Campresse as a thief; they hold him in suspicion, and that he is against the peace, and clothes himself well and nobody knows what from, and is always roving about by night (N.L., 5; and *ibid.*, Robt. the Fowler, 16). This is a common charge in the borough courts. John Merygo is wont to listen by night under his neighbours' eaves, and is a common night rover; fined 40d. (a very heavy fine), and arrest.

The bishop's court (C.B., 113) makes itself judge of contract between members of the society, adjudging a penalty for breach of

contract to make something promised, and for breach of covenant. Any matter which affected the peace or reputation of the community which could turn to the profit of the lord was a subject for the franchise court.

Slander.—Slander was a very serious offence which every court hastened to punish, though at the same time it was expected that everyone should be ready to inform against his neighbour. Alice Balle defamed the lord's corn (C.B., 130), whereby other purchasers forbore to buy the lord's corn, to the lord's damage. Rohese Bindebere (fined 3d.) called Ralph Bolay thief, and he (fined 3d.) called her whore. But the jury of men find that the trespass done to the said Ralph exceeds the trespass done to the said Rohese, and Ralph recovers from Rohese 12d. for his taxed damages.

"If anyone" (Beverley, p. 96) "shall backbyte or rayse any false lyes or slander upon any of his Bretherne, he shall pay to the use of the town of Beverley 5s. 4d."; the charter of incorporation of goldsmiths, plumbers, glaziers, plasterers, and painters of Newcastle-upon-Tyne in 1536 provides a proper penalty "if any brother defamed another by calling him a Scott, a murderer, a thief," apparently in the descending scale. Walter de Castleford in 1307 (Wakefield) sues Richard son of Brown for calling him Robert le Brus to despite him. By the rules of Waterford, 1477, it was ordered that if any man dwelling within the liberty

curse, defame, or despise any citizen in calling him Irishman, he should be made to pay 13s. 4d. to the Irishman without any grace.

The Court Books of the baronies of Urie in Kincardineshire and of Stitchill in Roxburghshire have many entries relating to slander, blasphemy, scandal, and scurrilous speeches; *e.g.* (Stitchill, p. 54), John Haggard for opprobrious speeches to Robert Lillie, fined 40s. Scots, and Robert Lillie for provoking of him by words and offering of straick and ryot 50s.

Nor would the franchise court permit any incitement to such behaviour under the guise of legal assistance. William Payns (Beverley, p. 46, 1429) is a sower of dissension and discord and a promoter of unrighteous lawsuits among many of the community, though he is wholly ignorant of law. No burgess is to retain or hire him, on pain of losing his burgess-ship.

Both Litigants pay Costs.—In most disputes between neighbours the court gets fees in this way from both sides. Nicholas Siward is amerced in 6d. (*S.P.C.*) for a false complaint against William Pafey, and William Pafey pays 12d. for fighting with Nicholas. Where William claims 12s. 6d. from John and John admits 4s. 5d. but denies the 6d., John is in mercy 2d. for detaining the 4s. 5d., and William 3d. for the 6d.

When Helen accuses Alexander of stealing and cannot prove it, the lord fines her £10; and when Alexander to pay her back accuses

her of plucking his kale and stealing his ewes and cannot prove it, the lord fines him £10.

Nothing, I think, marks the contrast more definitely between the mediæval times and our own days than the present untrammelled licence of slander. Père Duchesne slings his dirt with safety on all, whether it be to attack the character of some living man in authority, or to malign the memory of the dead. A revival of communal responsibility is in no respect so much needed as in this.

De minimis curat lex. Nothing is too tiny or too remote for the franchise court, whether manor or borough. John Pacher collects sticks and sells them outside the commune against the ordinance (Court Baron, 129). Emma de Ashwell bought of the parson of Pulham six coombs of corn, and because she did not get heaped-up measure she kept back a halfpenny from him (N.L., 11). A man is presented as finding a plank cast up by the river and not delivering it to the bailiffs.

Nuisance.—Nuisance plays a great part in all the courts, both of the king and of the franchises. Common offences are — having windows on the street which are an impediment to riders and walkers; emptying muck and ashes into the river, which was the king's highway; burying the offal of beasts in a muck-heap in the highway; making a saw-pit in the highway; diverting a water-course; building a pigstye or putting a dungheap on the

common: building a privy to the nuisance of another. All the offences become more marked and more frequent in the atmosphere of the town.

In the king's courts, equally, actions are brought for nuisance by destroying a foss so that cattle got in and ate up the corn (Y.B. 20 Edw. I., 224, 232), and making a foss so that the owner of woods could not cross to haul wood for firing.

In Y.B. 19 Edw. III. (178–184 and App.) is a case in which Maud, widow of Geoffrey Aleyn, the prioress of Stratford, the bishop of London, the prioress of Halliwell, and others had turned the course of the River Lea by putting in it piles, hurdles, locks, and divers contrivances for the taking of fish. The inquest found that the river was the king's highway.

Questions relating to the land of the franchise were settled in the first instance in the lord's court, such as title by descent, disputes as to boundary such as the right to a bank and a hedge, the widow's right to dower, in each case the lord taking money for making the settlement as the king did in his court. At the abbot of Bath's court of Bright Waltham, for instance, Hugh Poleyn gives the lord two shillings that he may have the judgment of the court as to his right in a certain tenement in Upton, and thereupon the whole township of Bright Waltham, sworn along with the whole township of Conholt, say upon their

oath that he has the better right and is the next heir by right of blood.

The lord as the chief of the community warranted quiet possession of the land to the tenant; as in our conveyances of to-day, an arrangement for mutual benefit, lessening the chances of violence and disputes as to possession. (See *T.A.C.N.*, c. 46.)

The court as police magistrate takes notices of all breaches of the peace, fines men for assault, for attacks on the lord's men, or for improperly levying the hue.

Trade.—When we come to trade, even domestic trade, such a home industry as brewing, the franchise courts were all-important.

Keeping the assize of bread and ale and regulating measures for selling was a regular duty of the court.

The authority weighed the loaves and gauged the accuracy of the measures for selling ale, presenting the brewers and alewives or tipplers, as they were sometimes called, if they sold above a fixed price. But the assize was broken so wholly and with such regularity that the fines look like an excise licence.

It is a common entry, especially in the town records, that all the brewers and alewives have broken the assize. Women did most of the beer-selling, just as now women keep many public-houses.

The trade regulations of the boroughs were rigorous. One of the chief duties of the town

community was to see that every man kept strictly to his trade and did not interfere with the business of his neighbour. The cobbler must stick to his last and not become in addition a flesher or tanner; the baker must not be a miller. There were no department stores or tied houses. The desire to create and maintain a monopoly conflicts with the sense that a man should not get rich quick at the expense of his neighbours.

Evading market tolls, selling unsound meat, sausages of measly pigs, or fish which had become stale by being kept long for a higher price, frauds in use of materials or quality of work, forestalling—that is, anticipating the market by waylaying the seller on his way and buying from him privately, so as to escape the market dues and the risk of competition in price,—carrying on a trade without being registered as a burgess, may be instanced as some of the matters regulated by the local control which governed all the affairs of life.

The burgesses by their court collected dues of all descriptions at every step in the sale and handling of every variety of goods and the exercise of every kind of trade; they amerced their members for breaches of minute police law of the borough, the double object being to control every detail of the trade in the town, taking care that no one traded who was not entitled to do so, and at the same time to provide funds for the expenses of the borough.

Alice the wigmaker and Agnes the book-

binder are presented as not being citizens, or, as we might say now, persons (N.L., 66); and John Truelove (*ibid.*, 73) is fined 12d. as being a tippler of beer.

But while the whole policy of the borough is to regulate prices most drastically, to confine closely the profits of the work to their own close trade union, though their despotism over trade conditions was in complete accord with the crude selfishness of the trade-union policy of to-day, they do not recognise the trade-union principle where it interferes with their profit. Having a craft guild contrary to the interests of the community (N.L., 42) is a presentable offence; in Norwich (p. 52) all the chandlers were amerced for making an agreement amongst themselves, to wit, that none of them should sell a pound of candle for less than another.

The freedom of the borough meant the monopoly of trade by its members, not only within its walls but in any district over which it can exercise authority. The modern trade union, whether of lawyers, teachers, or engineers, acts on the same principle, and makes believe in the same way that it is defending the freedom of its members.

And the king's boroughs claimed and obtained their monopolies against persons of the highest rank and power. For instance, by a law of William the Lion (*Acts of Parl. of Scotl.*, vol. i. p. 61) no prelate nor churchman, earl, baron, or secular person, shall presume to buy

wool, skins, hides, or suchlike merchandise, but that they shall sell the same to merchants of burghs within whose shiredom and liberty the owner and seller of such merchandise does dwell.

Distraint, the seizure of cattle or goods, was the usual proceeding for enforcing judgments. In both manor and borough we find provision made against violent rescue of distraints, when the aggrieved offender tried to drive his cattle away from the official distraining them.

The franchise court took note of the public duties owed, saw that everyone was enrolled in a tithing and that men were chosen to do military duty for the manor.

The freemen of the court choose in court those who are to do knight service for them (S.P. Manor Court, Honour of Broughton, Abbot of Ramsey's Court, 1258).

The frankpledge did not include clerks, and it did not include persons outside the district—that is, the stranger.

Entertaining strangers was very dangerous always and everywhere. The stranger might kill or rob or set on fire. In an action for waste by the burning of a kitchen by a strange woman who did not know the defendant, Willoughby J. (Y.B. 19 Edw. III., 194–196) says, "The burning is waste for default of good keeping. If your household harbour a stranger who puts houses to fire and flame, it will be adjudged waste." It was always better to pass the wanderer on.

Supplement

CHAPTER XIV

MEDIÆVAL AND MODERN LAW AND CUSTOM: A REVIEW

From hence onwards this book ceases to attempt, with slight exception, any marshalling of historical facts; what follows is for the most part the personal opinion and suggestion of the writer, his reflections on the contrasts and similarities between the mediæval customary law and our own modern legal system.

Generally, it may be said that there is very little breach of continuity either in matter or in procedure between the law and practice of the British Empire to-day, with the exceptions mentioned on p. 22, and the mediæval law and practice of society in the thirteenth century in England and in those parts influenced by the English law and procedure.

It is astonishing how little the action of our English criminal courts has moved, even in the picturesque ceremonial of the judicial spectacle, from the character of early days.

The eyre of justice still wends through the land; the local baron, compelled to accept the expensive honorary office of sheriff, attends the king's itinerant justices; until railways vulgarised the survival, he with his javelin

men, accompanied by every country gentleman who could obtain a horse, met them on the borders of the county and escorted them to their lodgings in the shire capital; Glanville and Archbold are still connected by mediæval forms expressive of archaic conditions, such as the statement that the offence committed is "against the peace of our lord the king, his crown and dignity"; and, where the legislature has not in some bungling manner attempted a definition of an act or crime, the old mediæval ideas, bound up with conditions of thought which have long since passed away, and staggering under the weight of centuries of gloss and commentary, still hold their own.

The Irish Brehon Law.—But the unbounded respect with which every Englishman must regard the present equity and purity of administration of the High Courts of the Empire does not prevent me from again expressing a wondering admiration at the equity and modernity, much more allied to Greek thought than to the Romano-Mosaic ideas, which are the characteristic of the Irish Brehon law of unknown age, so remarkable when compared with the scanty and primitive conceptions of the Norman Angevin in England at the time of the invasions; and a regret that the Anglo-Scots, when faced with the resentment of the Irish at the want of good faith and honest endeavour shown in the treatment of Irish questions, should not make some humble effort to get away from the dead religious

issue of past days, the fight between Dutch William and the French levies of James, the local antiquarian dispute superimposed as an occasion of offence on the true causes of friction, and to realise that they are dealing with a people who, in a very distant past, have had an extraordinary civilisation, which, so far as they have any national life to-day, is not wholly forgotten.

On the civil side the Brehon laws of Ireland give us the doctrine of contributory negligence, wholly absent from the early English law; they presume an implied in the place of an expressed contract; they treat of contracts avoided by fraud and mistake. They deal with partnership and agency and other matters of like kind long before the primitive English law paid any attention to matters of contract.

Most probably this premature commercial equity came from the same source as the provisions for distraint in the case of stranded whales or ships in the Senchus Mor—from the Norse seamen who controlled the southern Irish harbours. But it is not only the contract law which has prematurely advanced; the same modern equity, to which English law has only slowly approximated, is shown in the more sparse references to tort and crime.

The attempt to murder is treated as on the same footing as the completed act; but the greatest contrast lies in the relation of the laws to breach of faith. Perjury in Henry II.'s day seems only to have been considered as a

serious offence in England when committed by sworn jurors; up to the Reformation it was an ecclesiastical offence only; it was a crime which, in the eighteenth century being bailable as "only a misdemeanour," furnishes Fielding with one of his most telling sarcasms in *Amelia*. Yet it is impressed again and again in the Senchus Mor as a grave offence against society; it is a cause for the dissolution of contract between chief and follower; it is spoken of in terms of hatred and contempt.

The Irish law has become an exasperating antiquarian study enshrined in a language which, as a noted politician lately pointed out, is, like Greek and Latin, a dead language, and therefore not worth his study. But both the language and the law that it enshrines, speaking from their graves, keep alive through the centuries the distrust of the Saxon and of the Saxon law imposed upon them, associated in their minds with oppression and breach of faith.

It is not any theological dispute between different bodies of Irishmen which constitutes the Irish danger. The difficulty consists in the absence of any knowledge whatever, by the peoples of the larger island, of the Irish history of the past, and of all that concerns Ireland, whether in Connaught or Ulster.

This leads to a false perspective, giving prominence to a false issue which by a natural reaction keeps alive the evil influence of the political power of the papacy, and ignoring

the true national issue, the reality of the Irish struggle for self-government, the same for which the English fought from the twelfth to the seventeenth century, and for economic freedom.

The Changes Noted.—Several very far-reaching changes have taken place in society which have affected the basis upon which the law is administered. Status, the condition of inequality when only certain persons or classes had rights before the law, the condition on which the legal relations of society formerly rested, has, as I noted in the first chapter, disappeared except so far as it is left alive for the subordination of women; whether any form of social representation including women can be invented away from sex, in place of our present anarchical condition, to replace the older foundation of society, remains to be seen.

Another change which has but little relation to a comparison between mediæval and modern criminal law is the change from the normal condition of war, in which every freeman did his work prepared for instant battle with his neighbour, liable to a death penalty for cowardice or refusal, to the great burden on the nations of the world of an armed peace enforced by restless mercenary troops, alternating with ghastly periods of war.

A much more far-reaching change has been the great extension and strengthening of the federal power, owing to two causes—speed and ease of transit on the one hand, and as a

result, on the other, the weakening of local solidarity.

The authority of the remotely separated world which looked on from afar at the eccentric orbit of the Crown has become in every respect a subordinate part of a huge machine; the legal system works much more smoothly in consequence, but it works as a machine. The sense of personal and social responsibility and of communal pride, the jealousy of outside interference, which are the especial characteristics of mediæval law and mediæval society, have almost entirely disappeared from our society.

The federal power is so overwhelmingly strong that, however bitterly the individual or the people of the small world may feel at any legal action, it is rarely that it is questioned. And as a result, when from any cause the federal power is upset, all society goes with it.

This very supremacy of the federal power is associated with weakness which forms a strong contrast to the chief source of strength in mediæval society, the close co-operation of those with local knowledge of reputation.

What would our ancestors think of us if they knew that our daily prison population is over 20,000, fed and housed at the expense of the State—persons imprisoned for the most part for some breach of a fictitious regulation, which under the sane mind of the sane communal body of their times would not even have been prosecuted, or for some sin, such

as being sensibly drunk, which would in their day not have been noticed unless presentment had put money in the pocket of the court holder?

Society, being helpless, looks on indifferent; it becomes accustomed to believe that these breaches of police regulation are really evil acts dangerous to society, and it puts all its force on the side of those who repress what they are pleased to call crime.

People are so hopelessly ignorant of what goes on in our police courts, that I would just mention an instance in point. I was in a London police court some three years ago when a man was brought up charged with begging in Piccadilly at night. Asked what he had to say, he was selling bootlaces. Like the lightning which doth seem to be, etc., the answer of the magistrate was flung at him: "Who wants to buy bootlaces in Piccadilly at ten o'clock at night?—seven days"; and the old fellow was rushed off to gaol.

If you want to realise the difference between mediæval and modern police law, ask yourself what result might be expected from this sentence if (1) the man was a genuine old beggar who had had a bad day at his trade, as may have happened to John Stow; if (2) he was a professional looking for a sovereign from the drunken young plutocrat who was hunting a woman; if (3) he was beggar plus thief holding on for the chance

of what he could pick up; if (4) he was a dangerous character and burglar.

And to split up the possibilities, as P. and M. do the writ of entry, ask further what effect such a sentence in each case would have on (1) the law as a science or empirical study; on (2) the magistrate as a giver of just judgments; on (3) those persons who listened in court; on (4) those who spend their energy in relief of want; on (5) the man sentenced; and on (6) the policeman who prosecuted. That will give twenty-eight different aspects in which to view modern magisterial law as contrasted with mediæval law. It is not the course of the magistrate. The river bed has been prepared for him.

They, our ancestors, in those barbarous and far-removed days, were far too busy keeping the wolf from the door to keep over 20,000 persons fed and clothed and housed and warmed daily, doing nothing useful, but eating their hearts out for shame or contemplating fresh villainy at the expense of the community.

If a man had committed a real offence he was made to pay so long as he could pay, and if he could only work he was made to pay by working it out. If neither were possible, it was hinted to him that, in the place of the broad axe, he should find a new home, the equivalent of the exile later to New South Wales or Canada.

But—this is the chief distinction—so long

as he was not utterly hopeless, society, which had then a moral sense, kept him loose in its midst, tried to make a man of him, gave him discipline, found work for him, set him a good example, told him bogey stories of the fiends in wait, with horns, hoofs, and tail like the heifer he had stolen, and of the "rugger" which was hourly going on between them and the saints over his soul. It urged his kinsfolk to take charge of him and straighten him out, and as often as not he became a decent member of society as it then existed.

Our prison system, our degradation of human nature, our awful crime of penal servitude, did not then exist.

Parliamentary Legislation. — Apart from these fundamental changes in society which affect the administration of the law, the only large difference between the mediæval and modern law has arisen from its extension and alteration by parliamentary legislation. So long as this legislation concerns only half-dead political issues, each much-trumpeted advance in liberty merely acting as a register of changes of administration or voting capacity, rendered expedient by political or economic causes, measures long overdue to which the opposition has at length been broken down, little harm is done, except for a great waste of human energy and distraction of mental powers from human improvement.

But wherever Parliament has meddled with the science either in its exact or its experi-

mental aspect, there has resulted from the lack of time for discussion and adequate consideration of measures, from the disturbances occasioned by party bickerings over antique rules, from the ignorance of many members of both Houses of the elementary conditions of human existence, and from the perpetual call to compromise, an outpouring of a mass of orders and regulations often dangerous where it is put into force, but generally, like much mediæval statute, a pious wish, and always, unlike the mediæval statute, intolerably dull and verbose.

Sometimes, apart from these drawbacks, where the subject is criminal law and the legislature is in the mood to emulate Justinian, the legislation is quite in the mediæval style. For instance, up to 1861 it was a burglary by common law if the entry was made when there was not sufficient twilight or crepusculum "to see a man's face withal." The Larceny Act of 1861 makes Greenwich time the sole judge of the offence, defining night as from 9 p.m. to 6 a.m. So if in the darkest days of December an entry is made at 8.55 p.m. or 6.5 a.m., it is housebreaking only, with a penalty of fourteen years; but if made at 9.5 p.m. or 5.55 a.m., burglary, with a life sentence. The policeman's watch or his knowledge of the stars might solve the doubt.

A good example of criminal parliamentary legislation may be found in those clauses of

the Malicious Damage Act of 1861, which deal with the crime of arson.

Arson at common law is the malicious burning of a house, enlarged to cover dock-yards and other Government property by a statute of George III. The Act of 1861 sets out painfully at length in five long sections—each attended with the same penalty, a life sentence—every variety of property which the tired brain of the legislator could call up: a port or harbour, an inn of court or college, a chapel or meeting-house, a malthouse, a stable, a hop-oast, a package of goods, and so forth. Then section 6 imposes the penalty of fourteen years on the burning of "any buildings other than such," *e.g.* a pillar post-box.

The worst part of these long-winded laws is the way in which they are enforced. Even where they concern matters of civil import, not crimes, they are generally, as if they were the mediæval customary law of tort, attended with tremendous penalties, physical and pecuniary, for infraction—penalties which, if inflicted, would often cause ruin or great hardship. If such matters come before a jury they may decline to convict, and the judge may remit the penalty. But in most cases there is no provision for bringing them before a jury.

The majority of such laws are left to be enforced as the ancient tribal laws after the decision of the Brehon were enforced, as so much of mediæval custom was enforced, by

the common informer, the man who has an old grudge against someone who has neglected to comply with some provision and bears the wolf's head so far as that special Act is concerned, or by the man who, knowing of the omission, can levy blackmail by threat to prosecute. Except for this, most modern Acts of Parliament, especially any that are beneficial, die, like so many of the children of the poor, when under one year of age, from neglect or inanition.

But Acts of Parliament are not all left to this haphazard method of enforcement. The matter may be put by the legislator in the hands of that disgracefully underpaid and overworked body of men, the police, and of the crowd of convicted thieves and rascals under their control who assist them, and the offender may be charged under an Act of which he has possibly never heard, in a magistrate's court of summary jurisdiction.

This brings us to another very curious similarity and contrast between the law and police of mediæval and of modern times.

The Magistrates' Courts.—In 1907 in England there were tried in the High Courts 61,381 indictable offences, of which 53,793 were larcenies, receiving, and frauds.

These indictable offences included 45 murders out of 132 known to the police, and 3132 burglaries and housebreakings out of 11,470 known.

At the same time 685,574 non-indictable

offences were summarily punished in the magisterial courts by decisions from which there is no appeal, of which 49,996 were assaults, 210,024 drunkenness (none of which probably need have been noticed), 34,187 vagrancy, and *391,367 others.*

The average daily prison population for this year was 20,820. The proportion of such crimes to 100,000 population was 282·79 indictable and 1961·8 non-indictable.

The king's court remains much as it was when Glanville wrote. Here the barrister attends and deals with the indictable cases. There is never any want of advocates in these courts. But it would appear on the face of it that there had been a complete disappearance of all the other courts of the Middle Ages. Yet this is very far from being the case.

The court of the bishop, the regality, the manorial court, the hundred court, the leet cour, the court baron—in a word, the court of the chief—are with us in all their perfection, but they are merged in the court of the magistrate appointed by the federal government; he is the judge of the morals of the poor; he convicts for being sensibly drunk (Stitchill, p. 4), or, as it is now called, drunk in a police sense; he punishes women for immorality; he deals with all the petty thefts and quarrels and street nuisances.

And the sumpnour is there, the town bailiff, the manorial steward, the sheriff's clerk, the

chief's Brehon. They have disappeared in name, but their offices and all their opportunities have descended to, and been merged in, that judge of first instance, the policeman.

I doubt if in these courts of first instance there has really been any change at all, except that we have dispensed with any moral sense, that the police are vigilant in prosecuting the *391,367 others*, and that their relations to the society they serve have entirely changed.

The mechanical advances in the rapidity of motion, which account for more political changes than any other agency, have so diminished distances, so strengthened the authority which wields the power of the purse and the whole military force of the State, as against local influence or public opinion, that the police, a well-drilled, semi-military force, have come to be, at least in the larger cities, in closer sympathy and touch with the central authority than with the local community.

In these courts of summary jurisdiction, in the criminal cases from which there is no appeal, in the courts where the 685,574 non-indictable offences are tried, it is only in very exceptional cases indeed that the barrister appears, and only very few solicitors take charge of matters disposed of there. The management of the non-indictable causes, which deal with nearly the whole of the affairs of daily life, is left in the hands of the policeman.

It is he who takes charge of all the pre-

liminary proceedings. It is he, and not the archdeacon or the pope, who, if a bishop should write a religious work, will decide if it is a fit book to be put before the public of which he is the guardian.

He prosecutes in the courts. The accused, generally very poor and ignorant people, are undefended.

This is quite in keeping with the traditions of the early franchise courts, which were always jealous of the interference of the lawyer, and ousted him from any part of their proceedings.

In Beverley, for instance, in 1429, public complaints having been made "per plurimos burgenses" that William Payns is a sower of dissension and discord and a "motor" of unrighteous lawsuits though he is wholly ignorant of law—to the detriment, no doubt, in some financial way, of the community,—therefore, say the records, "by the common consent of the community," no burgess is to hire or retain him on pain of losing his burgess-ship indilate. And you will find the same jealousy of the profession in the Icelandic Things.

But in those days the officials, who are now represented by the police, the officials on whose preserve William Payns had intruded, were under no discipline from the federal power, even inimical to it, and they were directly responsible to the local society in the narrow circle of which their lives were spent. From that narrow circle all the force of their authority was drawn.

Women Barristers.—I would make a suggestion with regard to these courts, a suggestion prompted by a desire to see them linked closer to the community, dissociated from too close a connection with federal government and in consequence with current politics, and to see encouraged the closer sense of social responsibility for the more everyday matters of criminal procedure.

Very few persons of the sheltered class ever see the inside of these courts in which daily the lives of thousands of the poor are regulated and the weaklings punished—an evil negligence at any time, but excessively evil at a time when the young people who are especially liable to police jurisdiction are giving themselves to work for the country under conditions to them of great temptation and danger.

The bar has concentrated all its force on the indictable offences in the High Court, leaving the magistrates' courts bare of advocates.

The better class of women, moved in many cases by the sufferings of their sex as seen in these very courts, have recently become intensely insistent upon their right when properly qualified to act as advocates. Some women have qualified themselves for the profession. But the bar resists the invasion of this last fortress, and refuses to the women this completion of their freedom.

Yet it is always useless and dangerous to delay the inevitable when any group of men

or women are driven by an abounding moral sense to claim the power to use gifts of body or mind for the benefit of the community.

There is a special reason for opening this profession to women which exists in no other, unless in the calling of artists. The bar is the only profession which depends for success on personal characteristics which cannot be transferred. A solicitor's firm may conduct its business by a hoary-headed clerk, a parson may preach for years to a tired congregation, a doctor may depute his business to a partner. But no English barrister can delegate his responsibility. He depends solely on his own personality; all success rests on his personal ability only, which he cannot pass on to a deputy.

The weak point of a refusal to admit women to the bar lies in this peculiarity of the profession.

If all the women in the islands were to-morrow admitted to practice, only those would succeed, only those would interfere in the men's monopoly, who have the rather hard, rather mediæval temperament essential for the advocate—a combination of courage, judgment, and silence.

If of the men not one in a hundred, even when gifted with high university honours and high birth and local connection and political influence, makes of the barrister's profession a brilliant career, of the women, faced with the *brutum fulmen* of the judge, and the

tremendous prejudice of many men of the profession against women, not one in ten thousand would become a successful advocate. It is a purely personal matter. Why not let the women try?

My suggestion is this. The police courts, all courts not trying indictable offences, are empty of advocates; it is a very evil thing, leading to a great amount of perjury, that the police, who as the guardians of the law prosecute, should give evidence in their own favour without any check other than the evidence of those persons whose word would never be accepted by the magistrate against them.

The matters dealt with in the police court are such as intimately concern women. If, as in many cases with the sheltered women, they have no knowledge of such matters, the sooner they can learn them the better for the nation.

Such courts deal with such matters as the sending of women to gaol because their children have not attended school; because a child is verminous; because a child has fallen into the fire from the mother not providing a guard; because the mother has not paid the rent or the rates; because a policeman says that she accosted (beautiful police word "accosted") in the street a man not produced, for he made no complaint, or who had accosted her and been rebuffed—a charge which would subject a possibly innocent girl to an infamous medical examina-

tion, and drive her down on to the streets; because of a thousand things which concern only women.

Pure milk, women drunkards, the segregation of feeble-minded children, causes affecting women keenly, and of which they have knowledge, which now go by default because of the indifference or ignorance of the men,—all these matters might be treated in a more reputable manner if women were allowed to serve their apprenticeship as advocates in these courts only, to defend or even to prosecute.

Such an innovation would not only help those for whom they act as advocates. Many women would be introduced to a knowledge of the conditions attending a life of poverty of which now they are wholly unconscious.

I would not suggest for a moment that the seventeenth-century wig, with its little bare spot at the back reminiscent of the tonsure of Martin Pateshull, should be permitted to women. No woman should have a tonsure. But surely their artistic sense could be trusted to design some academic headgear suitable to the woman lawyer, reminding of the days of a greater reality before wigs, when Bereford and Stonore wore their own hair.

Nor need the women be tied down by the barrister's rules as to fees. Half a mark, I should say, or even a quarter of a mark, would be sufficient remuneration. The difficulty of the change would be solved.

The entrance of women into the police

courts as advocates would, it is hoped, put an end to one detestable practice of judges and magistrates—that of ordering women to leave the court in any case in which indecent conduct to women is being tried. I know no sight so pitiful, so humiliating to a man as to see a young girl by herself in the witness-box alone, surrounded by staring men, under severe examination of some counsel defending a man for an attack on her chastity, every woman who could stand beside her and comfort her being driven out, and every half-grown young male rushing into court in the hope of hearing some monastic matter.

The Police. — If we may judge by contemporary satire, the officers of the franchise courts were so poorly paid that they lived largely by bribery and blackmail. Their successors, the police force, are worse off than they. They are overworked, understaffed, and very much underpaid. Every new outpouring of legislation, accompanied by a mass of orders, rules, and regulations needing explanation and translation, increases their work and their responsibility without extra pay or increase of numbers.

Most of these so-called laws are so equivocally worded as to throw on the police Brehon the burden of construction of any legal or technical terms used; through the want of any adequate or definite provision for their enforcement, the methods of setting the law in motion are left largely to his own invention.

He is the Brehon, the only person who has an official right to interpret at a moment's notice legal language without the intervention of the imperial court.

The British police are probably, as a body, the finest body of men both in intellect and physical force to be found anywhere in Europe. They are men drilled in the strictest military discipline, liable to severe penalties for any breach of order, trained to loyalty to their leaders and comrades. They work for very long hours, subject to all the severity of the seasons, incessantly brought face to face with personal danger, encouraged to assume heavy responsibilities involving immediate decision —in short, undergoing hourly a discipline which hardens at every turn their mental and physical sense.

These men are expected to possess in addition the high moral tone and careless honesty of the judge of the High Court, at a wage a little better than that of a day labourer.

Of the many present dangers to our freedom this body of disciplined men constitutes the greatest. They are the Pretorian Guard waiting for the coming Cæsar; and in the meantime the offices of the sompnour and the bailiff and the sheriff's clerk, with the temptations to perjury and blackmail, have descended on their shoulders. That they are as good as they are is very great credit to human nature working under most adverse conditions, and

speaks volumes for the good influence of the magisterial bench.

But there is a much pleasanter side of our modern courts to be seen, as there was of the mediæval courts.

The Birlaw Court.—There was one more court with which I did not deal, which exercised police powers in those parts of the islands in which the communal system remained, down to a very late date, and to a large extent also in those parts where the communal courts had been superseded by the court of the baron, abbot, or bishop.

Disputes between agricultural occupants of land as to the little matters which so easily lead to bloodshed and hereditary feud—the use of water and pasturage, the jumping sheep, the poaching dog, the exact boundary of a field, and so forth—disputes which are frequent and inevitable, were regulated by a committee of neighbours called Birleymen or Birlawmen, from which we have our word byelaw.

The records of the lesser courts, especially north of the Tweed, are full of references to these arbitrators. Their jurisdiction had a very wide scope, extending to all those matters in which there was no profit to the lord.

In the first instance, the matters passed upon were those arising from agricultural operations, as these formed almost the sum-total of domestic trades in those days. But their duties were not confined to these. From the records of the baronies of Urie and Stitchill

we find that they are sent to search for stolen goods (Urie, 46), to decide as to the right to the possession of land (*ibid.*, 78), to decide controversies between lord and man (*ib.*, 178), to decide as to repair of houses (in 1713, Stitchill, 170), to impose stent and other impositions (*ib.*, 2).

Matters are referred to them from the barony court (*ib.*, 149), and support is given to them if resisted (*ib.*, 35). In a case where a defendant calls for a valuation of a linen web, two weavers were added as birleymen for that purpose (*ib.*, 192).

It was not an uncommon provision in a lease of land to a tenant to specify that he should be peaceable and settle such little differences peaceably with the neighbouring occupants.

In the Rental Book of the Abbey of Cupar, for instance, a lease is granted in 1468 to one Dic Scot, but it is to be revoked "if he shall not be sober and temperate, preserving more strictly a kindly intercourse with his neighbours and relatives." In 1470, in the same book, another tenant, John Crochat, is obliged to promise on oath to preserve a kindly and lawful neighbourhood.

In the Rental of the Bishopric of Aberdeen, 1511, the joint tenants were bound to keep "good neighbourhood," *i.e.* to agree as to their share of labour at the award of the "birleyman," the arbiter who settled local differences.

In the Rental in 1755 of the estate of Robertson of Struan round Loch Rannoch, forfeited after the '45, the factor reports that the inhabitants had right of common pasture; that the quarrels about the number kept by each were referred to the birleymen of the district according to the soumes—that is, the amount of pasture to be allotted to each on the outfield in summer.

Sir F. Palgrave, referring to Lock's account of the "improvements" in Sutherland, says: "Until the recent devastations in Sutherland the clans settled all questions relating to the pasturage of their glens by a jury of the most ancient inhabitants as a court."

The "Burlaws" were the settlement of local differences, the adjustment of local difficulty, by men of the district arbitrating between the interests and ill-feelings of their fellow-men, with whom it is to their advantage to stand well. Under such conditions differences would be made light of, and small offences would be ignored.

It is little known to the general public to how great an extent the police both in town and country act as a Burlaw Court to settle differences which, owing to their efforts, never come before the magistrates, but which might otherwise ripen into a feud between neighbours. Like all successful diplomatic efforts, the satisfactory result is hidden by the want of written record.

Quite recently a case came into the High

Court where, owing to ill-feeling between two Italian neighbours, the tomcat of one party, straying into the yard of the other, who was a sausage manufacturer, had not been treated with the respect due to his dignity. It is hard to believe that the expensive time of the High Court Judge would have been taken up with such a matter if the policeman had had a colloquial acquaintance with the Italian language.

But in spite of the value of his good offices in this respect, the policeman, as the Brehon or the Burleyman, is not wholly satisfactory. He represents too much the steward of the court of the lord, the Ardri, the arbitrary federal power, ready to enforce police regulations imposed from outside.

Is it not worth consideration whether, in addition to the policeman's good offices, communal responsibility for the settlement of the small irritations which are bound to arise in society could not be revived, now that we have once more felt the touch of national and imperial unity? It is not physical and intellectual capacity that we want—we already have both in the magistrates and in the police,—but the sense of communal responsibility, which includes a sympathy with the persons in trouble.

We have a body of birlawmen fit for the work who would represent what the police do not ever represent, the common opinion of the community—the special constables. "For two years thousands of men—the majority

employed during the day at business—have given up their spare time to police duties, and they are undoubtedly helping, no matter in how small or unimportant a way, at the time of national crisis. . . . The personnel of our section of the force includes stockbrokers, a master carpenter, civil engineers, surveyors, architects, merchants, a chartered accountant, market-gardeners, a builder, an artist, a barrister, a greengrocer, a solicitor, a butcher, a dentist, a plumber, a journalist, city clerks, local tradesmen, and several who would be described on the charge sheet as of independent means; and it speaks volumes for the spirit of the force that these men of totally different callings and social position have worked harmoniously together for over two years" (*Two Years with the Specials*, by a Sub-Inspector, p. 10).

Would it not be possible, as a great advance upon our present methods of dealing with non-indictable offences, and as a partial return to the best characteristics of mediæval customary law, that a court composed of such men, and of women of the same class, should sit from time to time in rotation, possibly as an elected body of the district, to dispose of all the petty cases which do not affect the public safety; with power, or, if found necessary, with instructions, to remit to the stipendiary magistrate any case requiring the judgment of a person remote from local influence, or that he should in like manner remit to them?

They would be paid by fees, to be exacted, like the fees paid to the Brehon, from the prosecutor only; the defendant, if convicted, to be mulcted in fines, or, if too poor, in labour of some kind. No prosecution would be entertained unless a prosecutor clearly shown to be independent of the police were forthcoming, and no police prosecution *per se* would be allowed.

This no doubt might adversely affect the number of daily prosecutions, but it would encourage a sense of social responsibility and would revive the honour and dignity of the law, which does not of necessity increase *pari passu* with the increase of police vigilance.

Such a tribunal would be more likely to deal justly, and with a view to prevention, with offences against women, with drunkenness and street disorders, juvenile offences, and school attendance; and the accused would be more likely to be satisfied with a sentence pronounced by his own neighbourhood than with one, apparently more technically equitable, given by a magistrate appointed by the Crown, at the instance of a policeman.

To take one class only of matters which now come into our police courts, all offences concerning women and girls should be dealt with by women. Unless this is done promptly, the new Venereal Diseases Act, intended to combat conditions against which so many suffragist women have given their liberty and their reputation, and even their lives, will

become nothing else than a fresh opportunity for levying blackmail by the police from the unfortunate women who are the victims of sweated wages and men's lust, and from young and inexperienced girls.

There could be no question that the policeman who had arrested an offender for a real and serious danger to the public, such as the furious driving of a motor car, would be supported by the solid force of local public opinion.

But would not a Burlaw Court, as representative of the community, be likely to deal more equitably with the matter if[1] a coster in Ratcliffe Highway stopped his barrow beyond the police limits; or a joyous party danced from pure delight at the fine day in Woburn Square; or a starving person asked an alms in Piccadilly or Paddington or Pentonville; or an organ-grinder played a Neapolitan ditty for the slum children of Westminster; or a man cried muffins on a Sunday afternoon; or a suffragist hawked violets in North London, or played a barrel-organ in Holburn, or chalked a notice of a meeting on the pavement of the Strand; instead of a prosecution, and of course conviction on the sole oath of the policeman, contrary to Deut. xix. 15 and Magna Charta, chap. 38?

[1] Most of the cases here suggested are charges which have recently been treated in the police courts either on the grounds of obstruction of the police or as offences under obsolete statutes.

I offer these suggestions as the result of a study of the jurisdiction of the communal and franchise courts of the past. They are merely isolated points which have occurred to me, very possibly to be scouted as impracticable, immature, inopportune, bad form. But no one who has studied the social history of the past can doubt the necessity of the awakening of the minds of all, both young and old, to their own personal responsibility for evil and wrong, which in democracy alone is either safety or progress, or doubt that it is an awakening which can only come through a knowledge of the social lives and social needs of others as they are daily disclosed in our midst. Class there will always be, financial, intellectual, moral; any Poor Law Guardian will find it in the workhouse. But that need not prohibit knowledge and sympathy between classes, nations, or races.

If we are ever to achieve any real unity of imperial peoples, our students must be weaned from that false teaching that "the central position of constitutional progress has always been the control of the purse by Parliament" and taught that progress lies in the just enforcement of everyday law, and that social is worse than financial bankruptcy.

CHAPTER XV

THE REVIEW CONTINUED

Legal Fictions.—We have not, however, quite done with the magistrates' courts. The police are not only the guardians of the law, but they preserve for us one of the most picturesque features of mediæval custom; a link to all humanity in all ages of the past, in all records of law and custom, in all climates; the key by which in a time of slow transition advanced men unlocked new ideas; legal fiction, the alteration of custom or law by lying. It is worth while going back to early law for a few examples.

When in the first instance the English king was tentatively enlarging the jurisdiction of his courts, one of the simplest means was by entertaining an appeal from the lord's court, as the pope tried to obtain appeals from the king's courts. But interference between the lord and those under his authority would be inviting (it did invite in John's day) revolution, until the king had sufficient strength to take his way without the consent of the lord. So at first we find from Glanville (xii. 3) that the writ of right in respect of land ownership issues "quia dominus

remisit curiam." The lord concurs in the appeal.

In the first instance it would most probably be a confirmation of his judgment, unless the appellant paid heavily for a reversal.

As the king grows stronger he dispenses with the lord's consent and entertains appeals without it. The writ issues in spite of the lord, but not openly. The words "quia dominus remisit curiam" remain. It is a fiction that the lord asked for trouble.

In like manner the king, filching jurisdiction from the sheriff's court, claims that the act charged was, in the phrase of our own day, against the peace of our lord the king, his crown and dignity, "de paci Domini regis infracta." As he grows stronger, and the habit of putting the words in the writ had obtained, they were assumed to be true when no longer they were so. They are now meaningless, but the want of meaning only expresses the advance of the kingly power.

Much more picturesque than these simple fibs are the writs by which, when the king's courts begin to reach out for private business, the barons of the Exchequer and the justices of the King's Bench acquire jurisdiction in common pleas.

The powers of the barons of the Exchequer at first extended to those matters only which concerned the king's revenue. Suits came before them where the party was a debtor to the king. These powers were enlarged to

include pleas between private persons by a writ of *quominus*, embodying the fiction that the plaintiff was the king's debtor, unable to pay his dues to the king for the reason that the defendant withheld money from him or did some act or neglect "quominus sufficiens exstitit" the king's claims.

The king's court, which depended for its power on the king's responsibility for the public peace, gained extension by a fiction of another kind.

The justices of the King's Bench as chief coroners had jurisdiction over deeds of violence wherever the court sat.

When the court became stationary, sitting at Westminster, it was enabled to use this power of coroner to draw to it civil cases, by imagining that an act of violent trespass had been committed in Middlesex, and that the defendant was fugitive and in hiding.

The fiction was called the Bill of Middlesex and writ of latitat; and where the defendant was not resident in Middlesex, the writ issued to the sheriff of his county alleging the violent act, and that "the said A. B. lurks and runs about in your county."

Then the various transitions take place to bring the fiction in line with fact. It is assumed that the defendant *latitat* lay hid in Middlesex; so slight was the distinction in those times between civil and criminal matters that at first he was taken into custody as on a criminal charge; then he freely appears and

gives bail; then it is recorded in the court roll as a fiction that he has given bail. And so the court obtains a new authority.

Put by the side of these fictions two modern instances of police procedure, fictions not invented to enlarge the scope of the kingly power, like those of the Middle Ages, but used to disguise want of imagination, poverty of expression, the inability to realise, or to reconcile, a change of ideas.

In 1913 Mr George Lansbury, a most honourable man of noble character, made speeches which caused embarrassment to the Government. He was prosecuted under a statute 34 Edw. III., c. 1, convicted, imprisoned, and tortured by forcible feeding. The statute was applied to him by a fiction, and you cannot appreciate the beauty of the fiction or its grotesqueness of application unless you know something of the political and social opinions of the man. That must be my excuse for a personal reference.

Mr Lansbury is one of those peculiar products of the men who fought and died for ideals in the past: a man who can take without thanks, even with indignant criticisms of shortcomings, all the inheritance of material advantage which he enjoys behind the British guns and fleet, all the growth of political freedom expressed in Parliament and common law, all the sacrifice of Christian example which had been won for the people of the British Islands by the blood of heroes and martyrs in the

centuries behind us; he can take all those benefits with which they have endowed him, he can express in his own person the altruistic qualities which are the bequest of the men who fought and died for an idea, he can enjoy them and enlarge on them and build on them abstract theories of universal happiness for mankind.

But when he is asked to help to defend and to encourage others to defend these great fortresses of moral advance against a pitiless foe without faith and without any altruistic conception, who stands as the exponent of autocracy against liberty, Mr Lansbury finds such a course against his conscience. His interpretation of Christianity would seem to be that we should tamely let evil overwhelm the world.

Such a conception of life is not, I believe, wholly unusual in men gifted with a tender and generous temperament, with an intense longing for a realisation on earth of the Christian ideal.

Such men are so intent on watching and alleviating, even at the risk of a bloody revolution, the undoubted sufferings of the mass of humanity in the abstract, that they have no eyes to look up at the advances won for them by the men whose heirs they are, the men who have died for men in all ages.

This, then, that follows is the fiction.

In the fourteenth century, when, by the treaty of Bretigny, the kings of France and

England—who, like the German now, organised war in a struggle for supremacy—made peace for a breathing space, they had to consider what should be the course taken with the disbanded soldiers. They tried to corral them into Brittany. "It was much better and more profitable," says Froissart, "that these warriors and pillagers should retire into the duchy of Brittany, which is one of the richest and best foraging countries in the world, than that they should come to England, which might be pillaged and robbed by them."

But some of them did come. Edward, owing to his possession of the entrance gate of Calais, was driven to pass a law "that in every county of England shall be assigned for the keeping of the peace one lord, and with him three or more of the most worthy in the county, with some learned in the law . . . to inquire of all those that have been pillers and robbers in the parts beyond the sea, and be now come again and go wandering, and will not labour as they were wont in times past, and to take and arrest all those that they may find by indictment and suspicion and to put them in prison; and to take of all them that be (not) of good fame where they shall be found sufficient surety and mainprise of their good behaviour towards the king and his people, and the other duly to punish." The "(not)" is supposed to have been put in insensibly at some time long past by some clerk.

Under this statute Mr Lansbury, the pacifist, was convicted as a piller and a robber in the parts beyond the seas. The Act has so been used by the magistrates, time out of mind, without regard to sense or meaning, to enable them to deal with disagreeable persons.

Clairvoyance.—The other illustration concerns one of the most indelible beliefs of all time, that there can be direct communication with the unseen world.

It is useless to fight such a belief, and it is dangerous, for we do not know how far it may be true. From time to time some members of every Christian body, to say nothing of imitative Buddhists, claim temporary establishment of such communication, and the Churches yearly assert the existence of the unseen world.

At the present time inquiry is general as to the nature of the future life. Everyone who has lost a child or a friend is asking, in the face of the yearly declarations of belief in hell fire, the perpetuation by a gracious and merciful God of eternal evil, what has become of the young impulsive life, faulty and sinful, that gave itself so gloriously as the sacrifice for high ideal and noble endeavour?

Women especially go and consult the clairvoyants, asking for news not only of the dead but of the absent men; and sometimes they must get false answers, and sometimes at least be comforted by what they hear, whether true

or false. There are no doubt plenty of pretended exploitations of the instinct, but it is hardly a time in which to prosecute lying. We are at least beginning to see that the communication of thought is more complex than we had imagined it to be; even wireless telegraphy tells us much.

There is probably no place which is less qualified to pass judgment on the unseen world than the magistrate's court, and no time less suitable in which to question it than the present.

Yet one unfortunate woman after another has been brought up before idle magistrates and convicted on *agent provocateur* evidence of the disguised police detective on the charge that she has taken money for telling something which she professed, rightly or wrongly (in my opinion always wrongly), to have learnt from the spiritual world.

Here comes in the fiction. The want of reality of the communication is not the gravamen of the offence. It is assumed. We have officially for the present given up the belief in witches, and there is no statute or common law dealing with such a question *per se*. Both Samuel and the Witch of Endor are equally outside our lawmaking efforts.

Even with such methods of legislation as obtain in our present Parliament, it is impossible of belief that any Act could be passed now prohibiting the attempt, whether false or real, to join hands with the unseen. If any

one doubts this, let him imagine the wording of such an Act.

The clairvoyants settled in the large cities, where they advertise their profession, are prosecuted as "vagrants" under the Vagrancy Act, 5 Geo. IV. c. 83.

One of the distinctive features of the produce of legislative bodies, as opposed to customary law made by communities who may suffer under it themselves, is that such legislation abounds in vague phrases, which may mean everything or nothing according to the discretion or the alertness of the magistrate or the magistrate's clerk. It is upon the vagueness of such phrases that these fictions can be founded.

This statute, a consolidation of previous Acts "for the suppression of vagrancy and for the punishment of idle and disorderly persons, rogues and vagabonds and incorrigible rogues," dealt with all the wandering folk who steal and plunder as they roam along the roads, the pillers and robbers with whom Mr George Lansbury was fictitiously connected. It specifies the many varieties of masterful beggars able to maintain themselves by work, and —the gist and object of the whole Act— becoming chargeable to the parish by not doing so.

Among these were the roving gipsies, whose wandering habits have never been wholly extirpated, people who made a living alternately by chicken-stealing and fortune-telling.

The Act includes among the offences of the vagrant on the roads, enchantments, sorceries, and acts magic, "pretending or professing to tell fortunes by using any subtle craft, means, or device, by palmistry or otherwise, deceive or impose on any of his Majesty's subjects."

It was not even dealing wholly with the conditions of its own time, but, like most of our later legislation, lazily adopted the language of the Acts which it repealed, and imported into the worst days of our legal history the ideas of the legislation of three hundred years before, when knowledge of the unseen world, and in fact of science at all, was dangerous unless licensed by authority. Such were the language and ideas of 22 Hen. VIII. c. 12 (1530–1), directed against "scholars of the universities of Oxford and Cambridge not licensed for begging"; against "proctors and pardners, and all other idle people going about, some of them feigning themselves to have knowledge in physic, physiognomy, palmistry, or other crafty sciences, whereby they bear the people in hand that they can tell their destinies, diseases, and futures, and such other like fantastical imaginations" (note the indefinite nature of the general phrases); and 13 Anne, directed against people "wandering in the habit or form of counterfeit Egyptians or pretending to have skill," etc., etc., "or pretending to tell fortunes or like phantastical imaginations, or any subtle crafts." The belief in witchcraft and the burn-

ing of witches had hardly died out when this latter Act was passed.[1]

This provision, intended to deal with wandering thieves, has been extended by judicial decision of the High Court to persons, not vagrants in any sense of the word, who can or who pretend that they can communicate with the unseen world.

If it is so expedient to set police spies to prosecute someone, why not boldly attack the people who encourage the lying by paying money for it, instead of using ancient fiction against the women? Why not have the courage to prosecute a psychologist who is wasting paper in a time of scarcity?

If the difficulty in the case is that the policeman cannot gain entrance to the philosopher in the guise of a seeker after truth, there is a world of capacity for mischief in the antique statutes such as 13 Edw. I., st. 4, *Circumspecte Agatis*: "such things as be meer spiritual . . . deadly sins . . . and such like."

This is contemptible, silly, childish, you will say, trifling with history. I quite agree. But it is not half so contemptible or so childish as the present use of police fiction, and at least it would be more effective as well as

[1] 1 Jac., which makes it felony to suckle imps, and describes the witch as one that "shall use, practise, or exercise any invocation or conjuration of any evil or wicked spirit, or consult, covenant with, entertain, or employ, feed or reward any evil or wicked spirit," etc. etc., had not then been repealed.

more dignified to make the attack, if the police must meddle with such things, on men who are very seriously considered.

It is sometimes asserted that these clairvoyants do harm. All lying is harmful, whether in Parliament or in historical criticisms. But it is hardly a time when we can afford to be prosecuting lying, and any harm, if there is any, is as nothing by the side of the irreparable injury caused to the law from its application to the mentality of the Middle Ages through the fictitious use of these statutes by an irresponsible police in the courts of magistrates often not trained in the law, from whose decision there is no appeal. What an authority said of the statute 34 Edw. III. c. 1 might be repeated of the greater part of our police law, namely, "The statute of Edward has been so extended that it has become difficult to define how far it shall extend, and where it shall stop." In this respect we join hands with the Middle Ages in one of the obsolete aspects of their police law.

The Moral Aspect.—The mention of the unseen world leads one to the strongest, the most abiding contrast between the customary law of early days and the law of our own day —their relation to the moral sense.

In the Middle Ages the belief in the reality of the unseen world dominated all the relations of life: an unseen world which was not a caricature of the human life, young men drinking whisky, smoking, and playing with a dog,

but a world of angelic beings, those perfected who had been faulty here, watching over the welfare of the souls which they had left behind.

Such a world was close to the present, but it was not only its nearness but its actual physical interference with affairs which gave authority for the literal interpretation of anthropomorphic rewards and penalties then declared by the Church in the future for good and evil done. Then the belief in Hell was a reality, a denial of God's omnipotence, an acknowledgment that every happening was the result of the ever uncertain conflict going on between good and evil.

Then the lay ruler took charge of such things only as concerned the public safety and the peace of the community, offences against life and property. The authority of the Church was far greater and more wide-reaching: it was exercised with no unsparing hand for the punishment of breaches of morals, which might not only have effect on the public safety, but might also compromise the future life eternal.

Nor was this all. The influence of the Church was felt in customary law far beyond the limits of its own courts. Even where it did not directly enforce its canons on the folk, the Church, itself a society, controlled the customary law made by the lay Thing or Folkmoot through the vivid belief in its authoritative interpretation of the Scriptures, through its control of all the approaches of

metaphysics and psychology, forcing the lay law of crime to fall in line with the received code of morals as interpreted by the Church. The mediæval law at its very worst had a foundation of morals.

Undoubtedly it lacked perfection; it was open to all the influences of avarice and self-seeking, of hypocrisy and gross superstition and vanity, of personal vice and conventual slackness, which intertwine themselves with and are more noticeable in the higher efforts of humanity. Only too often the great and wealthy churchmen tried to serve God and mammon together, and failed with both.

But at its worst the mediæval Church was better than the lay world around it. It kept before that lay world and enforced upon it obedience to moral discipline, and taught daily the ephemeral nature of all earthly glories, the belief in a future state, its overwhelming importance, and the need of preparation for it by penitence and prayer.

It knew nothing of the sordid catchwords for excusing failure of social duty; nothing of the maxim that honesty was the best policy, nothing of the fantastic theory of human equality, nothing of the rights of man against his fellows, nothing of supply and demand as a gospel of social relations.

And it had a social foundation. The larger part of the jurisdiction of the court Christian was devoted to those offences which deeply concerned social life. The Church made re-

peated efforts under conditions of great difficulty to regulate sexual relations and to give sanctity to marriage; it compelled the observance for the labourer of Sunday rest; it urged honesty in contract; it thundered against the inequitable use of money; it laid down that a man's debts should not die with him but should follow his goods in the hands of those who profited by his death; it insisted on the moral force behind the physical force in war; and in all times it declared the sanctity of pacts and treaties, of sworn oaths, and of the pledged word whether of prince or freeman. The perfect man for the mediæval Church was "he that sweareth unto his neighbour and disappointeth him not, though it were to his own hindrance."

As one looks back at the mediæval laws and compares them with our police system of to-day, two facts would seem to stand out. One is, that apart from any moral sense inherited from the time when the community was a reality, and when the Church as a power imposed upon the society the moral code as a real basis of life, our modern statute law and our police regulations which flow from it rest on brute force only.

They are framed solely with a view of ensuring material public safety for the moment by the coercion of a medley of isolated men and women, unconscious of any common bond of union or of any higher object in life than the satisfaction of the physical needs of to-morrow.

That such laws or regulations have any remote relation to morals at all results from their breeding in the social life of the past; through that they are infected with some element of social ideas which cannot wholly die among people who nominally profess Christianity. Otherwise they have no connection with any conception of a higher life.

Yet no society can have any stability unless its police laws, the internal regulations which check and balance the graspings and necessities attending the never-ending struggle to get daily bread, rest on some system of morals; and rest, further, on a definite system which has as its exponents a learned class whose voices shall be heard as impartial guides pointing to higher and better things.

To-day, men have largely ceased to look to the Church for guidance. Why? Possibly in part because of the indifference of the Church to legislation, its impotence to guide the making of law in Parliament into any moral channel. Yet the indifference is largely a historical development, and the impotence the result of politics of the past. The clergy's jealousy of the mediæval king's claim to tax them, and the king's jealousy of the pope's power to issue his political thunder through the clergy, led to their making their votes of subsidies in Convocation rather than in Parliament. From 1284 they were made in Convocation only. Later, Henry VIII., with the assistance of the Commons, forced the

clergy, in his conflict with the pope, to submit to make no new canons without his consent; and in 1664 they voluntarily abandoned their right to tax themselves in Convocation. As the resistance to taxation depended on the right to the redress of grievances, they ceased to have any part in making the laws of the nation. Finally, in the worst days of the dominance of German Lutheranism, a statute, 43 Geo. III. c. 63, forbade the clergy of the churches both of England and Scotland to sit in the House of Commons. To-day the Church, suffering for her indiscretions in the past, exerts no moral sense on the continuous downpour of legislation. Yet this is not the chief cause of the want of influence of the Church.

It is, I believe, because, like the kingship, it is an aristocratic institution in a day of demagogy, an institution representing society in a time when there is no society, when society is expressed in the individual, that the Church so little impresses itself upon the people. It may also possibly be partly because, in a day when the people of all parts of the islands have spread over the face of the earth, the Church is the Church of England or the Church of Scotland only, and not the Church of the British Empire; or, like Rome, the Church claiming the world.

It is hard to believe that there has been any time in which the clergy of our Churches as a body have ever been more devoted to duty,

more hard-working, more self-sacrificing, more alive to the perils and the evils of the times, more anxious to do service work for society. Their influence personally is great, though unseen and often unknown to themselves. They are still the only class of men who as a body are in touch, either in town or country, with some of all other classes of society as impartial friends, not, like the police, as official enemies. But they have ceased to control education or the making of laws, they have ceased to sit on the bench as magistrates, they have become in local difficulty subservient to the policeman.

They are weeds; plants out of place; expounders of a universal creed in an age when each man looks confidently to sit in the shade of his own schism and his own heresy; teaching obedience and insisting on authority to men who, though they may not have the reason to consider the secret lets and hindrances which in public proceedings are innumerable and inevitable, are yet prepared to instruct both soldiers, politicians, and churchmen in the art of government.

And like all organisms carried into an age remote from them, they are inert and timid in reforming those things which separate them from their own time.

The organisation of the Church of England crystallised in the reaction of the Restoration after the military tyranny of the Commonwealth, reverting after the great upheaval both

in ritual and doctrine to the more glorious Elizabethan days, so that it represents to the pagan democracy of our day, both in its liturgy and in its institutions, only a magnificent survival of the moral sense of a former time. Its courts, its influence and leadership in social life, its care for the morals of the community, have passed into the hands of the magistrate and the policeman, its control over the education of the young to a trades union of teachers who may either have no creed or may revel in gross Eastern superstitions which fill the vacant place of the Christian truths.

I do not know a more curious commentary on speculative thought than the shifting of the vague conceptions of the unseen world assumed at various times with the political conditions of the day.

In the Middle Ages, when the king was but *primus inter pares*, God was represented as having a continuous and occasionally an unsuccessful struggle with evil, supported by the offerings of the faithful at the shrines of the saints and by the threat of severe penalties in the future world. As the kingly power eats into communal liberty and the idea of the king as author of law and conservator of national military power gains ground, God becomes an absolute king, the power of evil being connected only with broomsticks and black cats and swallowing of pins. Milton the Republican under this influence depicts God as a Jacobæan Deity sitting on the throne

of Heaven and looking down with contempt on an unsatisfactory world of his own making, while Apollyon and Beelzebub and the rest of the motley crowd of fiends hold a Parliament, wrangle over military policies, and bring forward motions and amendments.

This view lasts until it gradually gives way to the Constitutional Deity of Huxley's time, a God who, retiring into Eastern majesty as the great first cause, does not interfere in world happenings, but carefully obeys the unaltering laws made at the creation by himself. Now we have offered to us Mr Britling Wells' invention of a finite God, who is to be the captain of a new quasi South American Republic, liable every ten pages to be assassinated, exiled, or interned by the author as he fails to satisfy the desires of the moment. We must look forward, I suppose, to the Goddess of Reason and the concordat with undying Rome, the God in cocked hat and jack-boots, which comes with military imperialism.

The second fact which in perspective and imagination stands out from a study of these mediæval records is, that, judged by the experience of the past, we are no longer a society, a community, but a collection of atoms only. The freemen, formerly holden together like cement in a strong wall, are left like a heap of loose stones; held together only by the brute force of the federal authority.

One of the chief interests of mediæval law is that it illustrates the intimate relations

between all the members of the community, big stones and little: king, chief, and common man sharing the same hardships and responsibilities; the Orkney earl who settles the neighbours' vendetta with his own money; the Scottish lord whose tenants "calumniate" him as "ane oppressor and exactor"; the Irish chief to be distrained on for not defending the alien of the clan under his protection; as well as the Brehon balancing the acts of violence against the thou's and thee's which provoked it, the birlawmen inspecting holdings and deciding as to title, or Walter the reaper presented by the freemen for concealing ill ploughing in a time of scarcity.

In the records of the courts, especially of the franchise courts, we can view lay society as it changes from the close bond of kinship of the pastoral people to the agricultural tie of the land community, from the larger kinship of the nation to the yet greater entity when the Christian peoples, faced with the Mohammedan peril, range themselves as of opposing faiths, the great transformation of European society, which causes great divisions, when they come to question their own leadership. And finally, the loose compact of social connection and blood mixture which commerce, ever widening, brought to the nations — a compact ever threatened, threatened now, by dynastic efforts for supremacy.

Amid all the changes it is in each case the community which as such interests itself

in the affairs of all, not leaving the little social troubles of daily life to the Prætorian policeman.

Modern Society.—What is our society now? There is no pretence of kinship—the freeman is no longer judged by the chief who represents his clan; there is no suggestion of communal land ownership—the numbers of the industrial army are too vast and too inexperienced of agricultural toil to allow of a pretence of ownership by the community of any but uncultivated or unfenced soil, except by robbery at the instance of the demagogue; in spite of the tricks which may be played by diplomatists over land boundaries after the war, the peoples of Europe are so confusedly mixed that few areas can be said to contain any one nationality; the many varieties of so-called religious beliefs in any one spot, founded only too often on a misapprehension of some obsolete heresy of the past, render difficult the grouping of any community on unity of religious faith, unless in this too the majority principle can obtain. Commerce is secretive, disliking unity and combination.

Can we once more form a community in which the binding force shall represent the social tie? And what would the binding force be?

I would very timidly suggest—a proposal which may sound Utopian—that social units based upon industrial guilds, composed of men

proud of the work of their hands and of their minds as artists, the descendants of the men who built the cathedrals and not merely parts of a German machine, might form such a society. Men giving willing obedience to laws made by the men of their community and enforced by themselves—obedience secured by a system of frankpledge which would come more easily to a people now becoming accustomed to discipline, a frankpledge which could be used to regulate the movements of the alien immigrants who, when this war is over, will seek to overwhelm us,—might form such a society. It would be a society also owning the waste, unoccupied, unenclosed land which can justly belong to no person, so long as no act of ownership has been exercised on it. I suggest that such a society might revive for us what is good in communal life.

But such societies would be merely the cells of a much larger community. If it were not for the dust thrown in our eyes by the extraordinary narrowness and antiquity of method of our historical education, we should see the only parallel to the family unit of the Middle Ages, to the independent franchises which leant upon and from time to time fought with the overlord, in the relation of the colonies and dependencies of the Empire to the Imperial Government in these little islands. Only the Irish, who are not brought up on English constitutional history, appear to see the connection.

If such a system of industrial guilds as I have suggested is possible, the whole British Empire would have to be covered with such units of society. They would be connected with the islands and with each other in the only way in which the colonies ever have been connected, by the same tie by which mediæval society was joined together, the personal tie, loyalty to a common sovereign, negligent or utterly opposed to the House of Commons with its control of the purse, and to constitutional history and the rest of it. Here, and here only, the modern imitates the social life of the mediæval order.

The king is the only bond between all these societies, the only acknowledged power over all these different peoples and nations and races. Each of these communities has its own Parliament, it pays its own expenses; but each gives expression of loyalty to the overlord, and looks to him for protection and for financial help in need, and closes the gates of its markets against his claim to trade. Each has its own franchise courts and its own special laws, as Mercia and Galloway had in the past. But none of them have any use for the interference of the ephemeral band of legislators in the House of Commons.

The personal tie of the king forms, especially with a great naval Power whose colonies are united to it by the sea, a great safeguard; countries where it does not exist, where, as in Russia, the social organisms are in a state of

transition to industrial individualism, while there are as yet no colonies as such, or where the colonies have been lost, as France lost hers to us in the eighteenth century before her Revolution,—such countries fall easy victims to anarchy, faced with the hungry proletariat sheep at home, which, promised by the demagogue impossible prosperity, look up and are not fed.

The relation of the kingship to our colonies as a reality is our only safeguard against a sudden overturning of all existing institutions. But its stability would appear to rest upon the possibility of collecting and organising the inert mass of individuals into local social units, which could supply the local patriotism, willing to support and to work with the distant authority of the overlord.

It is only the good social side which we would wish to revive from the past: the sense of social responsibility, the sense of unity which follows self-sacrifice and common suffering, the sense of national, of imperial endeavour for an ideal against evil conceptions, the cherishing of the everlasting hope.

If such an organisation be possible, it at least would obviate that tribal habit of settling quarrels by the strike, one of those innately evil things which the revolutionary demagogue blames the Church for not encouraging.

Might not a first move towards such a society be the admission of the women, and of the clergy of England and Scotland, the

two chief forces for order, peace, and morality in the community, to a share in influencing government, the one to vote, the other to sit in Parliament? If not, Parliamentary government would seem to be absolutely doomed.

Such a guild community, as it seems to me, would be founded, like mediæval society, on aristocracy, having faith both in leaders born and in heredity; and adding to their faith all those qualities of leadership, courage, knowledge, temperance, patience, godliness, brotherly kindness and charity.

If not, the society would at once dissolve by revolution into atoms, as the demagogue set one section of society against another.

The leaders themselves must have constructive tendencies, building, like the leaders of the Middle Ages, on existing conditions; building on faith — "I believe, therefore I think, I reason, I act"; not merely destroyers of churches in the name of liberty.

If such a community be possible, it must, to be permanent, have a foundation of moral faith. Without such foundation no system of laws can command more than the ephemeral assent of those who for the moment profit by them or expect to exploit others by their means. They become successive waves of irrelevant regulation of those physically or morally weakest, depending solely on force and constantly changing with the shifts of the political centre of gravity.

For the permanency of law, for the accept-

ance of the moral basis that is necessary for its permanence, we must approach the problems before us, the bettering and remaking of society, away from the arrogance of that truly German Anglo-Saxon doctrine of the white man's burden. We must try to have once more, as Lord Roberts is related to have urged, the nation on its knees, acknowledging the moral force beyond our physical effort.

No victory, however complete, won in this war by the valiant dust that builds on dust, will avail us when in future days we call on our rulers to restore the freely given freedom, when we buckle down earnestly to deal with the social dangers accumulating which we now brush to one side, unless we can fight our foes with moral as well as with physical weapons. Nothing else will serve. It is either brute force and revolution, or moral force and reformation. This at least we can learn from the Middle Ages.

There are worse things than repentance of wrong done or faith broken, either by German or Briton. And there are more unlikely creeds than the belief in obedience and discipline and in the merciful omnipotence of God, whose service is perfect freedom.

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